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No. 469

United States Court of Appeals

For the Second Circuit

CONSTANTINE MACRIS,

Plaintiff-Appellant,

against

SOCIEDAD MARITIMA SAN NICOLAS, S.A. and PETMAR AGENCIES, INC.,

Defendant-Appellees.

APPELLANT'S BRIEF AND APPENDIX

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APPELLANT'S BRIEF AND APPENDIX

This is an appeal from a judgment entered upon a memorandum and an opinion order of the United States District Court for the Southern District of New York.

At the close of the five day trial the court below delivered findings of fact by memorandum (R. 806-813, 649).

On re-argument, the court affirmed its "comments" in an opinion, dated December 31, 1955 (R. 814-820).

Judgment was entered thereon, January 18, 1956 (R. 821-823).

STATEMENT

This seaman's action for money damages, arising from personal injuries sustained while employed on the S.S.

Euryviades, owned, managed, operated and controlled by the defendants, was grounded upon the Jones Act, 46 U.S.C. § 688, and upon the general maritime law of Liberi ,[1] the law of the flag.

The causes of action as stated in the complaint were predicated upon (1) the hiring of the disabled seaman, previously injured aboard the ship due to the negligence of the defendants and their failure to provide plaintiff with a seaworthy vessel, (2) failure to provide the plaintiff with proper medical treatment and, (3) failure to furnish maintenance, cure and wages (R. 663-667—appendix, p. 2a-6a).

The plaintiff was employed aboard said vessel for a voyage from Piraeus, Greece (November 10, 1951) to Richmond, California (July 7, 1952). During the voyage plaintiff signed off the vessel at Baltimore and re-signed immediately thereafter (April, 1952).

The court below found:

1. Plaintiff was injured during the voyage in Bremen, Germany, January 8, 1952.

2. Plaintiff's condition progressed and worsened during the trip between Bremen and Baltimore, Maryland, reached in April, 1952.

3. Plaintiff's condition remained substantially the same after Baltimore and until the plaintiff underwent surgery on August 11 and 25, 1952.

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[1]The non-statutory general maritime law of the United States was adopted as the general maritime law of Liberia (R. 11, 12). As such, the general maritime law of the United States is applicable herein.

4. Plaintiff's complaint related only to that period from Baltimore and thereafter.

5. Plaintiff and defendants presented their cases for the entire voyage from plaintiff's original sign-on in Piraeus.

6. Since plaintiff's injuries progressed and worsened only during the period from Bremen to Baltimore and the complaint encompassed that period from Baltimore and thereafter, no recovery could be permitted.

7. Plaintiff's motion to amend the pleadings and to conform the pleadings to the proof was denied on the ground that there was no surprise to the **plaintiff** by the proof tendered.

8. The Jones Act was inapplicable in a claim in which plaintiff was a foreign seaman employed by the defendant shipowner corporation (controlled by American interests), solely because said corporation owned only 82% and not 100% of the vessel (the captains owned the other 18%).

THE QUESTIONS PRESENTED

Was it reversible error for the court below to deny plaintiff's motion to amend the complaint and to conform the pleadings to the proof, at the time of trial, in the absence of surprise to any party, and thereby deny to the plaintiff a recovery to which he was entitled on the merits, in the light of all admitted evidence?

Did the court below err in holding the Jones Act inapplicable in an action by a foreign seaman employed by

a foreign shipowner controlled by American interests, which corporation admitted ownership in, and actually owned 82% of, the vessel and when an American corporate defendant, controlled by the same interests, had exclusive management and operation of the vessel?

Did the court below err in denying maintenance and cure solely because of plaintiff's refusal to return to the marine hospital for further necssary treatment?

Did the court below err in failing to grant plaintiff his unearned wages to the end of the voyage?

THE FACTS

The plaintiff was born in Roumania in 1918, moved to Greece and was educated at the University of Athens, majoring in politics and government, until 25 years of age (R. 335). Plaintiff was with the Royal Greek Navy, managed a honey factory and was with the Department of State for two and one-half years (R. 336, 337).

In 1947 the plaintiff first went to sea as an apprentice, was promoted to second mate (R. 337) and sailed steadily until the voyage on the S.S. Euryviades in 1951 and 1952 (R. 444, 446).

The voyage started in Venezuela, September 1, 1951 (Deft. Exh. B). Plaintiff signed on the vessel in Piraeus, Greece, November 10, 1951, as second officer (R. 338, 449). He had passed a physical examination as fit for duty (R. 339). Nicholas Dracatos was the captain of the vessel. The captain's brother was the "second commander." There was no chief officer (R. 449).

The vessel sailed to Odessa, Russia; Belfast, North Ireland and arrived in Bremen, Germany on January 8, 1952 (R. 340, 341, 508-513).

At Bremen the vessel tied up parallel to the dock (R. 516). Plaintiff's position for the mooring operation was aft with crew members (R. 343, 516). The captain was on the bridge (R. 516).

Plaintiff was ordered by the captain to help the mooring operation by manually pulling on the mooring lines with the seamen and, while doing so, felt a pain in his groin (R. 345, 522-523). The plaintiff testified that such work was done only by seamen and not by officers (R. 346).

Plaintiff did no manual labor after feeling the pain (R. 526) and reported the accident to the "second commander" (R. 346).

The plaintiff testified [and this was admitted by the "second commander" (R. 580)] that he requested an examination of the condition (R. 350), that after several requests he was sent to a doctor on the 17th (nine days after the accident) (Plt. Exh. #4). Plainitff was told by the captain that the doctor advised that no operation was necessary (R. 352, 527) although the plaintiff requested one (R. 527).

The plaintiff further testified that on the voyage from Bremen to Santos, Brazil, he was ordered to chip paint with chipping hammers and paint (R. 354). The captain admitted that plaintiff painted the bridge (R. 581).

The vessel reached Santos on March 12, 1952 and, on plaintiff's request, because of the pain (R. 357), he was sent by the captain to a doctor (R. 355). A double truss was prescribed for the condition (R. 356). The captain was advised that the plaintiff had the beginning of a hernia (little hernia point) (Plt. Exh. #5), and that an operation was necessary (R. 583).

The vessel continued to Trinidad (R. 359), then to Baltimore, Maryland, and plaintiff was again ordered to chip, paint, manually aid in closing the hatches and to operate the winches (R. 359, 530).

In Baltimore, Dr. Kelly, employed by the defendant, examined the plaintiff on board the vessel, diagnosed plaintiff's condition as "dangerous" and advised an operation (R. 362, 535, 588) (Plt. Exh. #7—appendix, p. 6a-7a).

Plaintiff requested an immediate operation (R. 364), signed off the vessel because of illness (R. 535, 589) and at his request was taken by immigration officials to the United States Public Health Service Hospital for an examination, April 8, 1952 (R. 362, 415) (Plt. Exh. #6).

Plaintiff was found "fit for light work not involving heavy lifting" and returned to the vessel (R. 416) where he requested that he be returned to Greece (R. 537).

Plaintiff was offered repatriation to Greece on a vessel leaving 18 days later but when advised that he would be retained at Ellis Island, a "prison" for aliens, plaintiff refused (R. 538) and re-signed for the continuation of the voyage (R. 540, 590), the only alternative since plaintiff was not permitted to enter the United States (R. 599) (Deft. Exh. H).

On the voyage from Baltimore to Korea plaintiff felt worse, couldn't get out of bed at times (R. 417-418), but was again ordered to chip and paint despite his condition (R. 546).

In Korea plaintiff requested an examination by a doctor.

Ten to twelve days later, the request was granted (R. 418, 546, 595). Plaintiff was advised that he needed an immediate operation (R. 418).

Upon request that he be permitted to remain in Korea for surgical treatment, plaintiff was informed by the captain that he would be returned to the United States for an operation (R. 419).

The vessel sailed to Richmond, California, (R. 419) arriving July 3 or 4, 1952 (R. 420). Plaintiff signed off the vessel on July 7, 1952 for medical treatment (R. 421-422, 599) and returned to New York by train (plaintiff paid the fare, later reimbursed) (R. 423).

In New York, plaintiff discussed the question of his treatment with Panaghi D. Marchessini, the head of a shipping combine which included the defendants herein, and was examined by Dr. Dugdale who advised plaintiff to enter a hospital for the operation (R. 424, 550-551).

Marchessini refused to permit the plaintiff to enter the Marine Hospital at Staten Island and insisted that plaintiff return to Greece for surgery (R. 424-425, 551). After a 20-day delay, during which time no treatment was afforded the plaintiff, he was permitted to enter the Staten Island hospital (R. 426-427, 552).

Surgery was performed on August 11, 1952 and again on August 25, 1952. After the second operation plaintiff felt his bladder full and he was unable to pass water (R. 430). As a result of this condition plaintiff underwent numerous catheterizations and was transferred to the Urology Department for continued treatment (R. 431).

Plaintiff testified, both on direct and cross-examination, that he was advised by the Marine Hospital physician that two operations were necessary in August because of the progression of the condition over the seven-month period (R. 430, 565-6).

Dr. Warnock testified that he recalled having a conversation with the plaintiff in the Marine Hospital (R. 501), thus confirming, to that extent, plaintiff's testimony.

The doctor also stated that the condition of the patient determines the surgical procedure to be followed (R. 490-491).

"Q Inarticulately I intended to ask, you form an opinion before you go into surgery, do you not?

A Yes.

Q As to what you are going to do. Does that opinion include a decision as to whether you will do one side or both sides during the one operation? In other words, do you make up your mind before you start working?

A Generally, yes, sir.

Q In determining whether you will do one operation or two, what is your major consideration?

A Well, how the — what is going to be the ultimate outcome for the patient.

Q In other words, the patient's welfare, that is your primary concern, is that right?

A Yes, sir.

Q Is it his condition which is the basis of your decision as to what procedure you will follow, his state of health, the extent of the damage?

THE COURT: Why don't you ask him a general question rather than trying to lead him now?

Q All the factors which you find the patient has at the time, are they all part of the basis of your opinion?

A We take all those things into consideration.

Q The extent of the damage, is that one of the considerations?

A Yes."

Plaintiff further testified on the subject of his inability to have any sexual relations since the second operation and his resulting marital difficulties (R. 437-440). Plaintiff's sexual impotency was confirmed by Dr. Hyslop (R. 384).

After plaintiff's discharge on September 23, 1952 he was on outpatient treatment until December 29, 1952 (R. 432-3).

Plaintiff stated that in ' is visits to private physicians during 1953, 1954 and 1955 for catheterizations and other treatment, he incurred medical and medicinal expenses totalling $675.00 (R. 443-444). He explained that when his condition became such that he required a catheterization he would find a doctor to treat him, that the average charge was $5.00, that for the year 1955 to the date of trial he had been treated about 30 times (R. 562-564).

Plaintiff first returned to work on May 15, 1954 as a typist and clerk (R. 433-435).

THE PLEADINGS AND PROCEEDINGS IN THE COURT BELOW

The action was commenced on December 12, 1952 (R. 663, 669). Issue was joined on January 10, 1953 (R. 670-673) and a note of issue filed (R. 674).

Plaintiff's present attorney was retained in place of previous counsel on October 25, 1954 (R. 700).

A preference was thereafter granted (R. 713-717). In his affidavit in opposition to the preference application, signed January 17, 1955, defendants' attorney discussed the original injury in Bremen (R. 683-699). Obviously, even at this early date, the defendants were aware of the scope of plaintiff's cause of action and were defending against it.

On January 27, 1955, approximately nine months before trial, the examination before trial of the plaintiff was taken by the defendants at the office of their attorney (R. 733-777). Consisting of 45 pages, the examination of the plaintiff concerned itself, inter alia, with events from the time plaintiff signed on the vessel in Piraeus, Greece in November, 1951 up to and including the arrival of the vessel in Bremen and the continuation of the voyage to Baltimore. The questions concerning this period total 28 pages of the examination.

An amended answer was filed on June 10, 1955 (R. 711-712).

Thereafter, motions were made by the plaintiff and defendants (R. 723-726, 727-731, 778-783, 785-787, 801-805a), which are either immaterial herein or were not determined by the motion part and the trial court below as unnecessary for the adjudication of the law suit. However, the affidavits of the attorneys for all parties herein refer, on numerous occasions, to the injury sustained by the plaintiff in Bremen and the events which occurred during the voyage from Bremen to Baltimore, January to April, 1952, a further showing of notice of the claim.

At the opening of trial the attorney for the defendants, correctly assuming that plaintiff would move to amend and conform, opposed by affidavit said motion to amend the complaint to include that period from the injuries sustained by the plaintiff in Bremen and thereafter (R. 825-828).

The action was tried by the Court without a jury on the 25th, 26th, 27th, 28th and 31st days of October, 1955.

Plaintiff's opening statement encompassed that period from plaintiff's birth, his early life, signing aboard the vessel at Piraeus, Greece, his voyage to Bremen, his injuries at Bremen, the voyage to Baltimore and plaintiff's operations for his injuries at the United States Public Health Service, Staten Island, New York (R. 2-7). There was, in addition, a statement of contemplation by plaintiff's attorney to move to conform the pleadings to the proof of the original injury in Bremen (R. 7).

Plaintiff's attorney then stated the theory of liability to be one of negligence and unseaworthiness of the vessel in Bremen which caused the original injury and a

failure to treat the condition, necessitating two extensive operations instead of a single less extensive one. (R. 12-14).

During the trial and after direct examination of the plaintiff was completed, the court denied the defendant's motion to strike the testimony which dealt with incidents prior to the vessel reaching Baltimore (R. 444).

Further negating any question of surprise to the defendants by the introduction of facts prior to Baltimore, the defendants, cross-examining the plaintiff in testimony covering 40 pages of the minutes (R. 449-463, 508-532), asked 256 questions concerning facts of the voyage from Piraeus to Baltimore.

Plaintiff's attorney, after the close of plaintiff's testimony formally moved to amend the pleadings to conform to the proof (R. 568). The motion was denied without prejudice although the court expressed its opinion that there had been no surprise to any party by the evidence introduced (R. 569).

The defendants immediately thereafter, **on direct examination** of their witness, Dracatos (R. 570), asked 73 questions covering 14 pages of the minutes (R. 571-584) concerning the period of the voyage from Piraeus to Baltimore.

The plaintiff and Dracatos were the only fact witnesses.

During the closing statements by the attorneys for the parties and the comments by the Court (R. 607-655) the question of amendment and confirmation of the pleadings to the proof arose several times.

Conceding that evidence outside the scope of the pleadings had been introduced (R. 608), the defendants' closing statement concerned itself with the original injury in Bremen (R. 608-611).

Plaintiff's attorney discussed the question in the following manner (R. 632-633):

> "The condition, injury which Mr. Macris had, which we claim was negligently caused in the first instance, and with all sequellae flowing therefrom, is the responsibility of the respondent. That is why I made my motion to amend the pleadings to conform to the proof."

and then commented on the facts which occurred before Baltimore (R. 633-635).

The court below in its memorandum first stated that it would deny the motion to amend and gave as the basis for its decision the lack of foundation or surprise to justify the amendment of the pleadings at that time (R. 806-7).

The court held that the original hernia injury in Bremen was not caused by the negligence of the defendants or unseaworthy condition of the vessel (R. 807), that although the plaintiff's condition did not deteriorate between Baltimore and Staten Island, "it did progress and get worse between Bremen and Baltimore" (R. 807), and further commented on the fact that an operation was recommended at Baltimore (R. 807).

Although the issue of foreseeability of the injury to the bladder as a sequellae of the delay in performing the

operation was expressly left unanswered (R. 809), there was a finding of fact that the injury resulted from the anesthesia administered during the **second** operation (R. 809).

In addition, the Jones Act was held inapplicable, but the general maritime law was applied, since the vessel was partially owned by the captain and his brother (R. 810).

Concluding, the court did not deem it necessary to decide the amount of maintenance and cure due the plaintiff (R. 810) or the validity of the "waiver" signed by the plaintiff at Baltimore (R. 812).

On the motion for re-argument, the court affirmed its views that the plaintiff's claim was limited to a claim for aggravation after Baltimore, and held that any evidence introduced of events prior to that period was received solely upon the issue of the defendants' duty subsequent to Baltimore (R. 816).

Conceding that the motion to amend was made at the close of trial, the court held that the defendants had no notice of intent to amend (R. 820), that the proposed amended issue was not tried by the expressed or implied consent of the defendants (R. 819).

POINT I

The court below erred in denying a motion to amend the pleadings and to conform the pleadings to the proof, made at the time of trial by the plaintiff, in the absence of surprise to the defendants and when such denial resulted in an opposite determination than the findings indicated on the basis of all the admitted evidence.

The court below found an aggravation of an injury caused by a seven-month delay in treatement. As such the court should have determined the matter in plaintiff's favor in the interest of justice and equity as proved by the factual evidence.

The denial of such justice on the narrow and technical procedural basis of denial of a motion to amend the pleadings and to conform them to the proof would appear to be in direct conflict with the views expressed by the Supreme Court of the United States in *Pope & Talbot v. Hawn*, 74 S. Ct. 202. wherein said Court expressed its opinion that the basis of decision should rest upon substantial justice irrespective of choice of forum or form of pleading.

The case of *United States v. Memphis Cotton Oil Co.*, 53 S.Ct. 278, seems determinative of this issue. Suit was brought against the United States to recover an overpayment of taxes. The Government opposed recovery upon the ground that the claims filed for the refund were too vague and indefinite and that amendment came too late. Judgment for the taxpayer was confirmed, the Court stating (281-282):

"The Commissioner has the remedy in his own hands if the claim as presented is so indefinite as to cause embarrassment to him or to others in his Bureau. He may disallow the claim promptly for a departure from the rule. If, however, he holds it without action until the form has been corrected, and still more clearly *if he hears it, and hears it on the merits, what is before him is not a double claim, but a claim single and indivisible, the new indissolubly welded into the structure of the old.* (Italics ours).

Rule 15 of the Federal Rules of Civil Procedure was adopted for the very purpose of guaranteeing to a suitor his day in court on the merits, not emasculated by narrow concepts and interpretations of pleadings.

Rule 15 of the Federal Rules states:

"Rule 15. Amended and Supplemental Pleadings

(a) Amendments.

. . . . a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

(b) Amendments to Conform to the Evidence.

When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion

of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence."

Barron & Holtzoff, "Federal Practice and Procedure", Vol. 1, discussing Rule 15, states as follows:

"Sec. 441. Function and Effect of Amended Pleading

The purpose of an amended pleading is to include matters which occurred before the filing of the original pleading but which were either overlooked by the pleader or were unknown to him at the time. It is a substitute for the original and relates to the facts that existed when the original pleading was filed." (P. 872).

"Sec. 442. Liberality in Allowance of Amendments.

Under this rule leave to amend pleadings should be granted freely when justice so requires and the adverse party will not be prejudiced thereby, to clarify the issues and expedite the disposition of litigation." P. 872-874).

"Sec. 442. Liberality in Allowance of Amendments.

Rule 15, which requires court to grant leave to amend freely when justice so requires and which provides for relation back of amendments was drawn to give effect to principle that cases should, as far as possible, be determined on their merits and not on technicalities." (1956 Pocket Part, p. 234)

"Sec. 445. Discretion of Court

The trial court is vested with a sound discretion in granting or refusing leave to amend.

*** *** *** ***

In the absence of an abuse of discretion the trial judge's allowance or refusal of leave is not reviewable on appeal. However, the trial court's discretion may be controlled by the appellate court, and a failure to exercise discretion may result in reversal." (p. 880-881)

"Sec. 446. Timeliness of Motion to Amend

*** *** *** ***

As a general rule unless the rights of the adverse party are prejudiced, leave to amend may be allowed at any stage of the case where justice requires.

*** *** *** ***

The determination of timeliness of an amendment and of laches of the moving party depends entirely upon the particular facts and circumstances of each case and delay alone is not necessarily the decisive factor. Thus the court, exercising a wise discretion, may allow amendment after pleading time, after issue

has been joined, after dismissal of the complaint, after pre-trial conference, when trial is about to begin, during the course of trial, after verdict or judgment, and even on appeal or after remand." (p. 886-891)

"Sec. 447. Matters Considered on Motion to Amend

The primary consideration in determining whether to grant or deny an application for leave to amend is whether the allowance thereof will work an injustice to any of the parties. The interests of both parties should be considered and opportunity given the pleader to present his contentions." (p. 893)

"Sec. 449. Amendments to Conform to the Evidence

Rule 15 (b) sanctions amendments to conform to the proof (1) when issues not pleaded are tried by consent, express or implied, and (2) when evidence is objected to as not within the issues made by the pleadings, but the presentation of the merits will be aided and the opposing party not prejudiced by the amendment. Thus the objection that evidence, otherwise competent, is at variance with the issues made by the pleadings is not decisive. The variance may be corrected by amendment, in the sound discretion of the trial court.

A motion to amend to conform to proof may be made and granted at any time after presentation of the evidence has begun, and is frequently allowed during the course of the trial after the close of the testimony, and even after return of verdict, or entry of judgment, or on appeal, or after remand." (p. 914-915)

In Brown v. Dunbar & Sullivan Dredging Co., 189 F.2d 871, (2d Cir.), an action for wages and liquidated damages under the Fair Labor Standards Act, judgment for the plaintiff was affirmed wherein the district court permitted the filing of an amended complaint adding parties to the suit. This Court stated:

> "If then amendments were presented, the judge could consider them in the interest of orderly procedure and in the spirit of the free amending privileges contemplated by the rules, with no time barriers involved. See also, Bartels v. Piel Bros., supra. After all, the rules were intended to facilitate the application of substantive law, not to fight it." (p. 875)

Kerrigan's Estate v. Joseph E. Seagram & Sons, Inc., 199 F.2d 694 (3d Cir.), an action to recover money wrongfully paid under contract, reversed and remanded a judgment for the plaintiff.

There had been a cross-claim under Rule 13(g), not filed, which had arisen out of the same general transaction. The Court permitted an amendment conforming the pleadings to the proof and stated:

> "We are accustomed to the application of the rule that pleadings may be treated as amended to conform to proof. F.R.C.P. Rule 15. 3 Moore's Federal Practice 846. Analogous situations include treating an action erroneously brought at law as transferred to equity (3 Moore's Federal Practice 822), and treating issues actually tried as having been raised in the pleadings (Id. at 843). Certainly a pleading is judged by its substance and not its form, e.g. whether a claim is a counter claim or cross-claim depends not on what it is

labeled but whether the party against whom it is asserted is an opposing party or a co-party. 3 Moore's Federal Practice 15. Amending to show jurisdiction is liberally granted when the court in fact has jurisdiction. 3 Moore 831, 836. As a practical matter the only reason for not allowing an amendment is prejudice to the opposing party and no prejudice can arise here where all parties concerned joined in the stipulation." (p. 696)

In *Robbins v. Jordan*, 181 F.2d 793, (C.A. D.C.) a suit for malpractice, plaintiff moved at the time of trial for an amendment of the pleadings, which was denied. Plaintiff appealed from the directed verdict for defendant at close of plaintiff's case. The appellate court reversed and remanded, holding:

"Having found that the court's refusal to grant the plaintiffs leave to amend their complaint worked to their prejudice, the only other problem for us to decide,, therefore, is whether or not the learned trial judge exceeded the limits of his discretion in so refusing. Rule 15 (b) of the Federal Rules of Civil Procedure, 28 U.S.C.A., provides in part: '*** If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense on the merits. The court may grant a continuance to enable the objecting party to meet such evidence.'

As was said in International Ladies' Garment Workers' Union v. Donnelly Garment Co., 8 Cir., 1941, 121 F.2d 561, 563: 'The Supreme Court of the United States has fixed the limits of permissible amendment with increasing liberality and has ruled that a change of the legal theory of the action is no longer accepted as a test of the propriety of a proposed amendment **** Rule 15 of the Rules of Civil Procedure**** expresses the same liberality with respect to the amendment of pleadings.'

(1) Amendments under Rule 15 (b) are, as a general rule, allowed with great liberality, Federal Deposit Ins. Corp. v. Siraco; Watson v. Cannon Shoe Co.; Newman v. Zinn; Pearl Assur. Co., Ltd., v. First Liberty Nat. Bank.

*** *** *** ***

(2, 3) There can be no question that a defendant should be protected from surprise resulting from a change of theory; but it is our opinion that the court erred in the method it chose to protect him. The proper procedure would have been to grant the defendant a continuance in order to meet the new evidence. But it was beyond the limits of its judicial discretion to refuse to allow the amendment." (p. 794-795)

In *International Ladies' Garment Workers' Union v. Donnelly Garment Co.*, 121 F.2d 561, (8th Cir.), a petition for rehearing and motion to modify on opinion, the Court stated its view with respect to Rule 15, as follows:

"(1) The tendency of the federal courts has been

consistently towards greater liberality in the allowance of amendments to pleadings.

*** *** *** ***

' . . . when a defendant has had notice from the beginning that the plaintiff sets up and is trying to enforce a claim against it because of specified conduct, the reasons for the statute of limitations do not exist, and we are of opinion that a liberal rule should be applied.' See, also, Manhattan Oil Co. v. Mosby, 8 Cir., 72 F. 2d 840, 843, 844; United States v. Powell, 4 Cir., 93 F. 2d 788, 790. The Supreme Court of the United States has fixed the limits of permissible amendments with increasing liberality and has ruled that a change of the legal theory of the action is no longer accepted as a test of the propriety of a proposed amendment. United States v. Memphis Cotton Oil Co., 288 U.S. 62; 68, 53 S. Ct. 278, 77 L. Ed. 619. Rule 15 of the Rules of Civil Procedure, 28 U.S.C.A., following section 723c, expresses the same liberality with respect to the amendment of pleadings." (p. 562-563)

Voltmann v. United Fruit Co., 147 F.2d 514 (2d Cir.), was an action for personal injuries for negligence. On trial, defendant moved to amend its answer modifying an admission, which was granted. The appellate court held that it was not error since plaintiff had an adequate opportunity to present proof on the subject. Plaintiff did not move for an adjournment in order to obtain and present proof.

In affirming judgment for the defendant this court held:

"The amendment was well within the letter and spirit of Rule 15 (a), Federal Rules of Civil Procedure, 28

U.S.C.A. following section 723c, and if the plaintiffs were really surprised and put to some disadvantage greater than the expenditure of time and effort to get additional procurable evidence at that time their attorney should have requested a postponement of the trial in order to prepare his case properly." (p. 516)

In *Underwriters Salvage Co. v. Davis & Shaw Furniture Co.*, 198 F.2d 450, (10th Cir.), for recovery of damages in a warehouse fire, judgment for plaintiff was affirmed.

The district court decided the case on grounds other than alleged in the complaint.

The Court stated:

"As we said in Kilbourn v. Western Surety Co., 10 Cir., 187 F.2d 567, 571, 'The new rules of Federal Procedure were adopted to unshackle the practice of law in the courts from the straight jacket of technical rules of pleading and procedure. The rules were liberalized to the end that there might be more speedy and complete adjudication of a controversy between all interested parties without regard to technicalities and mere formal technical rules.' Under Rule 15 (b) 28 U.S.C.A., a liberal provision is made for amendments to conform the pleadings to the evidence and in such cases it is the duty of the court to consider issues raised by evidence received without objection even though no formal application is made to amend. El Paso Electric Co. v. Surrency, 10 Cir., 169 F. 2d 444; Simms v. Andrews, 10 Cir., 118 F. 2d 803; Pasquel v. Owen, 8 Cir., 186 F. 2d 263; Ruud v. American Packing & Provision Co., 9 Cir., 177 F. 2d 538." (p. 453)

Lloyd v. United Liquors Corp., 203 F.2d 789, (6th Cir.), was an anti-trust action. Judgment for defendant was reversed and remanded. The district court had dismissed the action on motion, for lack of jurisdiction. Plaintiff had proposed an amendment of the complaint, which was refused. In reversing, the Court stated:

> "Rule 15 (a), Federal Rules of Civil Procedure, provides that leave to file amendments to pleadings 'shall be freely given when justice so required.' Rule 15 (b) further evinces the purpose of the rule makers to have been that material amendments shall be freely allowed to accomplish the presentation of an action on its merits. Under this rule, certain amendments may be made, 'even after judgment.'
>
> In Sinclair Refining Co. v. Bennett, 6 Cir., 123 F.2d 884, 886, this court, pursuant to its interpretation of Rule 15 (b), held that a trial court properly allowed the plaintiff in an action for damages to amend her declaration *at the close of the evidence*, to conform to her view of the evidence as it affected the plea of the statute of limitations. We expressed the opinion that the amendment was properly allowed in the interest of justice. See also Tahir Erk v. Glenn L. Martin Co., 4 Cir., 116 F. 2d 865, 871, stating the principle that, under Civil Procedure Rule 15 (a), the liberal allowance of amendment of pleadings is a 'complement to restriction of objections for substance and form.'
>
> In International Ladies' Garment Workers' Union v. Donnelly Garment Co., 8 Cir., 121 F. 2d 561, 563, the Court of Appeals pointed out that the tendency of the

federal courts has been consistently toward greater liberality in the allowance of amendment to pleadings, and said: 'The Supreme Court of the United States has fixed the limits of permissible amendment with increasing liberality and has ruled that a change of the legal theory of the action is no longer accepted as a test of the propriety of a proposed amendment. United States v. Memphis Cotton Oil Co., 288 U.S. 62, 68, 53 S. Ct. 278, 77 L. Ed. 619. Rule 15 of the Rules of Civil Procedure, 28 U.S.C.A., following section 723(c), expresses the same liberality with respect to the amendment of pleadings.' For illustration of the extent to which has been carried the liberality to be accorded in the matter of amendment of complaints under Rule 15 of the Federal Rules of Civil Procedure, see the opinion of the Supreme Court in Tiller v. Atlantic Coast Line Railroad Co., 323 U.S. 574, 580, 581, 65 S. Ct. 421, 89 L. Ed. 465." (p. 793)

See: *Sunray Oil Corp. v. Sharpe*, 209 F. 2d 937 (5th Cir.);

United States v. Koike, 164 F. 2d 155 (9th Cir.);

McDowall v. Orr Felt & Blanket Co., 146 F. 2d 136 (6th Cir.);

Tahir Erk v. Glenn L. Martin Co., 116 F. 2d 865 (4th Cir.);

Baltimore & O. R. Co. v. O'Neill, 211 F. 2d 190 (6th Cir.);

Heay v. Phillips et al, 201 F. 2d 220 (9th Cir.);

Holley Coal Co. v. Globe Indemnity Co., 186 F. 2d 291 (4th Cir.);

Stepp v. United States, 207 F. 2d 909 (4th Cir.);

Tiller v. Atlantic Coast Line R. Co., 65 S. Ct. 421.

The cases relied upon by the Court below appear to be inapplicable herein. *Simms v. Andrews*, 118 F. 2d 803, (10th Cir.), 1941, was a suit against the Collector of Internal Revenue to enjoin a sale of realty for a tax deficiency and for a return of notes claimed to have been unlawfully levied upon it.

The trial court denied a motion to conform the pleadings which would have set up, after judgment, an entirely new issue of the statute of limitations, which issue had not arisen at the trial.

The appellate court affirmed on the ground that the issue had not been presented at the trial so that there was no proof to which the pleadings could be conformed.

United States v. Brookhaven, 134 F.2d 442 (5th Cir.), 1943, concerned an attempt after defendant's judgment in a suit at law to amend the complaint and pray for equitable relief. The Court, denying the motion, held, inter alia, that the new bill would be against other parties and implied that a new claim for relief should be brought.

Nordstrom v. McAllister, 9 F. R. Service, 15b.1, Case 5, p. 335, concerned itself with a motion to conform the pleadings to the proof, after judgment, in order to set up a defense of limitation of liability. The court held that the issue of limitation was not tried by express or implied consent of the parties, that evidence of privity was not in the mind of any party during the trial insofar as presenting the issue of limitation.

By the above quoted cases it would appear that a motion to amend the pleadings and to conform said pleadings to

the proof would be freely granted, in absence of such surprise to the party **in opposition** that the issue could not be defended.

The court below misinterpreted Rule 15 and applied a directly contrary test for motions of this nature, to wit, whether the **movant** was surprised by the issue.

This construction of the rule is diametrically opposed to its express purpose—extreme liberality in freely granting the relief, as is fully set forth above.

In the absence of any surprise to the defendants herein, it is respectfully submitted that the court below was in error in denying said motion, further emphasized by the fact that an opposite ruling would have resulted in a judgment in favor of the plaintiff.

Appellant humbly suggests that the following facts are determinative on the issue of surprise:

1) The complaint presented sufficient facts and information under the Federal Rules of Civil Procedure to notify the defendants of the original injury in Bremen during the voyage and prior to the vessel's arrival in Baltimore.

Paragraph 6 of the complaint spells out the prior injury caused by the negligence of the defendants and their failure to provide a seaworthy vessel. The sole data lacking is the date of the original injury.[2]

[2]The lack of ambiguity of the complaint was demonstrated by the absence of any motion under Rule 12 for a more definite statement.

Under the Federal Rules, a complaint is merely a notice of claim and the theory of liability upon which the claimant relies. *Hickman v. Taylor*, 67 S. Ct. 385; *Continental Collieries v. Shober*, 130 F. 2d 631; *Hirshorn v. Mine Safety Appliances Co.*, 193 F. 2d. 489; *United States Plywood Corp. v. Hudson Lumber Co.*, 17 F.R.D. 258. As such, appellant submits that the defendants were put on notice of an injury caused by their wrongful acts in the complaint.

2) The defendants were aware of the nature of the claim on January 17, 1955.

In his affidavit in opposition to plaintiff's application for a preference in January, 1955, the defendants' attorney spelled out the facts of the original injury in Bremen and the claims thereunder. (R. 683-699).

3) The examination before trial of the plaintiff on January 27, 1955, by the defendants fully informed them of the events giving rise to the cause of action from the time of plaintiff's sign-on in November, 1951 until the then present date.[3]

It can hardly be seriously contended by the defendants that they were not fully informed of all of the facts which occurred during the voyage, and more specifically that period from plaintiff's sign-on in Piraeus, in view of the affirmative steps taken by the defendants in their pretrial preparation, **nine months before trial.**

4) On numerous motions[4] **by the plaintiff and the defendants, the claim herein was characterized as one**

[3] Ante., p. 10.
[4] Ante., p. 11.

arising from an original injury in Bremen, rather than one solely for failure to treat after Baltimore.

5) The issue of amendment and conformation was placed before the court below even before the introduction of any evidence. Plaintiff's opening statement concerned itself with the period from plaintiff's sign-on in Piraeus. During said statement plaintiff's attorney observed that "due notice" had been given of plaintiff's intention to amend and conform (R. 7). This was not denied by the defendants.

Thereafter, the question arose during the introduction of evidence on several occasions (R. 341-2, 444, 568) and during the closing statements and the court's comments (R. 608, 647, 651, 652). Although the defendants objected to the introduction of evidence of events prior to Baltimore, there was no assertion of surprise or inability to defend on the issues. The court admitted all evidence offered.

The record of the trial conclusively belies any possible charge of surprise since the defendants extensively cross-examined the plaintiff concerning the pre-Baltimore period[5] and, on direct examination of their witness, Dracatos, thoroughly delved into the events from Piraeus to Baltimore.[6]

The defendants offered the crew list for the voyage involved herein into evidence. Said voyage commenced on September 1, 1951 in Venezuela and terminated on July 24, 1953 in Italy (R. 456-7) (Deft. Ex. B). Thus the entire

[5]Ante, p. 12
[6]Ante, p. 12

period encompassed by this suit was one voyage and could not be severed as was erroneously attempted by the court below.

The court specifically found an absence of any surprise by the introduction of the evidence concerning the period from Piraeus to Baltimore (R. 806-7).

Appellant respectfully submits that, in absence of surprise, such narrow interpretation of Rule 15 subverted the concepts of justice and equity to be afforded all litigants and calls for reversal of the decision of the court below.

POINT II

Failure to provide an injured seaman with prompt, proper and adequate medical treatment gives rise to a cause of action within the purview of the Jones Act and/or under the provisions of the General Maritime Law.

In *The Iroquois*, 24 S. Ct. 640, a libel for failure to treat for refusal of the vessel to deviate to an intervening port in order to obtain proper surgical attendance for the injured libelant, the Supreme Court stated:

> "The duty to provide proper medical treatment and attendance for seamen falling ill or suffering injury in the service of the ship has been imposed upon the shipowners by all maritime nations. It appears in the earliest codes of Continental Europe and was expressly recognized by this court in the recent case of *The Osceola*, 189 U.S. 158, 47 L. Ed. 760, 23 Sup. Ct. Rep.483." (p. 640-641)

In *Cortes v. Baltimore Insular Line*, 53 S. Ct. 173, a death claim under the Jones Act, the Supreme Court, determining that the cause was within the purview of the Act, stated that although the duty arose under the provisions of the general maritime law for failue to provide proper medical treatment, the negligent failure to do so would give rise to a claim under the statutory as well as the non-statutory law.

Morris v. United States, 3 F. 2d 588, was a claim for failure to treat. Plaintiff sustained a hernia condition and requested care, which was refused. The captain felt that the plaintiff was shamming the injury. Holding for

the defendant on other grounds, the court declared that a cause of action for failure to treat would lie for a bona fide error of judgment by the captain.

In *The Point Fermin*, 70 F. 2d 602, the claim consisted of failure to treat an injury to a seaman's hand, sustained without fault of the vessel. Granting recovery, the court held that damages were recoverable for the negligent failure to treat and did not depend upon fault of the vessel for the original injury. The court further stated that except for an emergency, requiring an injured seaman to work in a manner detrimental to his condition would give rise to a cause of action.

> "In our opinion appellant is also entitled to recover damages because of the failure on the part of the master to provide him with proper medical care and attention. It is settled that the shipowner is under a duty to furnish medical aid to a seaman who suffers injury or becomes ill in the service of the ship, and damages for neglect of this duty may be recovered in a proceeding in rem. The Iroquois, 194 U.S. 240, 24 S. Ct. 640, 48 L. Ed. 955; Cortes v. Baltimore Insular Line, 287 U.S. 367, 53 S. Ct. 173, 77 L. Ed. 368. Except in the face of danger to the ship or other emergency, to require an injured or sick seaman to perform work substantially detrimental to his condition is in effect to fail and refuse to provide that care and attention to which he is entitled under the law." (p. 604).

In *De Zon v. American President Lines*, 63 S. Ct. 814, a Jones Act claim for an eye injury for failure to treat, the Court stated:

"When the seaman becomes committed to the service of the ship the maritime law annexes a duty that no private agreement is competent to abrogate, and the ship is committed to the maintenance and cure of the seaman for illness or injury during the period of the voyage, and in some cases for a period thereafter. This duty does not depend upon fault. It is no merely formal obligation and it admits of no merely perfunctory discharge. Its measure depends upon the circumstances of each case—the seriousness of the injury or illness and the availability of aid. Although there may be no duty to the seaman to carry a physician, the circumstances may be such as to require reasonable measures to get him to one, as by turning back, putting into the nearest port although not one of call, hailing a passing ship, or taking other measures of considerable cost in time and money. Failure to furnish such care, even at the cost of a week's delay, has been held by this Court to be a basis for damages." (p. 818-819)

In *Holliday v. Pacific Atlantic Steamship Co.*, 197 F. 2d 610, a seaman's badly swollen leg developed into septicemia. There was a 15 hour delay in calling a physician although the urgency was apparent.

The court held that the plaintiff did not have to prove with absolute certainty that the condition would not have developed had the doctor been called but rather that the likelihood of the arrest of the condition would have increased if there was no delay.

To the same effect, see: *McAllister v. United States*, 75 S. Ct. 6.

The case of *Robinson v. Isbrandtsen Co.*, 203 F. 2d 514, by this Court, granted recovery in a suit for failure to treat a condition which grew no worse because of the delay and which eventually resulted in complete recovery.

The Court held that the right of recovery stemmed from delay in treatment, not by reason of deterioration of the condition.

> "Aggravation is not synonymous with deterioration. Though plaintiff's condition grew no worse, failure to provide medical care would constitute aggravation, since with proper treatment he might have improved and been cured. Here again, the causal chain was cast by the testimony of plaintiff's expert witness. The evidence indicates that what should have been done was not, and what was done should not have been." (p. 515)

For the proposition that recovery is permitted for failure to furnish proper medical care and treatment in actions instituted for consequential damages, see: *North Alaska v. Larsen*, 220 F. 93; *The Eva B. Hall*, 114 F. 755; *The City of Alexandria*, 17 F. 390.

Norris, "The Law of Seamen," Vol. 2, discussing seamen's rights to medical treatment, states:

> "§ 579. Failure to Provide Proper Medical Attention.
>
> Arising out of the seaman's relationship to his vessel is the affirmative duty imposed by the general maritime law upon the master and owner to accord to him while aboard the vessel, such medical care and attention as the ship may afford.
>
> • • • • •

The failure of the master to furnish maintenance and cure to a sick or injured seaman, which failure causes or aggravates an illness, gives the seaman a right of action against the master and owner for the injury done to him. The recovery in such circumstances includes not only necessary expenses but also compensable damages." (p. 204)

"§ 584. Failure to Provide Proper Medical Attention: Hospitalization in Port.

When a vessel reaches port it is incumbent upon the master to provide a seriously sick or injured seaman with immediate hospital care. The duty is an affirmative one and where the external symptoms indicate the seriousness and danger of the illness or injury, the master will not be excused for failing to perform the duty to accord proper medical care because the seaman did not demand to be sent to a hospital." (p. 215)

"§ 585. Failure to Provide Proper Medical Attention: Damages.

The failure to give a seaman sick or injured in the service of the vessel proper and adequate medical attention is tortious and gives the seaman a right to proceed for damages. The courts allow compensatory damages for loss of future earnings, pain and suffering and for medical expenses incurred by the seaman.

In determining consequential damages, the courts take into consideration the suffering of the seaman as a result of the neglect and delay in giving him proper treatment." (p. 216)

Affirming a decree for the libelant in *The Svealand*, 136 F. 109, the Court of Appeals for the 4th Circuit held that the duty to furnish medical treatment was an affirmative one by the vessel. The court stated:

> "Nor was it necessary for him (libelant) to demand to be sent to a hospital. The duty imposed upon the ship was an affirmative one; that is, to care properly for a crippled seaman, and see that he was afforded prompt and proper medical and surgical treatment; and he should have been sent to the hospital in his then condition, and under no circumstances should the ship have put back to sea with a seaman, at the end of his voyage, in the crippled condition in which he was." (p. 112)

In *The M. E. Luckenbach*, 174 F. 265, the court stated the affirmative duty of the shipowner in this manner:

> "It was the duty of the master to look out for the care and health of the libelant, whether he made a request of him so to do or not; and from this testimony it is clear that libelant's condition, lasting during a period of seven days before reaching Colon, was such as to require of the master, in the exercise of that degree of care, consideration, and responsibility which his position imposed upon him, to see what was the character of the fever from which libelant was suffering, and was something as to which he could not hesitate, vacillate, speculate, or take chances upon. Ships of the size of the Luckenbach having no physician on board, the crew have to look to the master for proper care and medical treatment in matters affecting their health; and, when taken ill upon a voyage, the laws of humanity require that the master, having sick members of his crew in charge, should treat them with the

utmost care, kindness, and consideration consistent with the circumstances in which he is placed, and see that intelligent medical assistance is furnished as soon as possible." (p. 267)

See also: *The Badger*, 218 F. 81; *The Governor*, 230 F. 857.

In the instant case the court below found that there was a delay in treatment (R. 809). The original injury occurred in Bremen, January, 1952. Plaintiff was not surgically treated until August 11 and 25, 1952, some seven months later.

The court stated that it was convinced the injury was bona fide (R. 649).

The court specifically found that plaintiff's condition progressed and worsened during the period from the date of the original injury to the date of surgical treatment but dismissed the claim on the ground that the period of progression was outside that set forth in the complaint.

The captain admitted that the plaintiff did manual labor after the injury was incurred and that he had knowledge of said injury.

The captain failed to arrange for hospitalization to surgically correct the condition even when informed by the defendants' doctor that such treatment was necessary.

It is respectfully submitted that the elements of a cause of action for failure to treat in the case at bar are far stronger than those in *Robinson v. Isbrandtsen*, supra, in which this Court laid down the quantum of proof required for recovery by a seaman for the failure of the shipowner to fulfill its duties arising under the Jones Act and the general maritime law.

POINT III

Causal relation between plaintiff's condition, the necessary surgery and his post-operative difficulties was established and so found by the court below.

The district court accepted the conclusions of Dr. Hyslop (R. 622-3), plaintiff's expert witness who had examined the plaintiff at the defendant's request (R. 367, 809), that plaintiff's condition resulted from the anesthesia administered during the second operation.

> "Let me start you off by saying that I am disposed to accept the conclusion of Dr. Hyslop. I was quite impressed with him." (p. 622-623)

The doctor qualified as a neurologist specializing since 1922 in the organic nervous system (R. 366). His report, dated September 23, 1954, was introduced as Plaintiff's Exhibit #9, which pointed to the spinal anesthesia as the causative factor producing the plaintiff's present condition (appendix, p. 8a-10a).

The doctor performed a neuro-examination with particular attention to the functions of the lumbar and sacral segments (R. 370) and determined that the plaintiff suffered from a neurogenic bladder with damage to the cord centers caused by the operation with the anesthesia the "primary culprit" (R. 370, appendix, p. 13a).

He stated that delay could be a competent producing cause of aggravation (R. 374-5, appendix, p. 13a-14a), that the delay and aggravation could cause a hernia to be more extensive and require more extensive repair, and that

procrastination would have an adverse effect (R. 377-8, appendix, p. 14a-15a).

Continuing, his testimony was that plaintiff's atonic bladder was caused by the anesthesia administered during the operation and its effect on the centers of the spinal cord, that is predisposes to a complicated involvement of one or both kidneys (R. 378-9, 395—appendix, p. 15a-16a).

Syphilis and gonorrhea were ruled out as a causative factor (R. 384).

He further testified that plaintiff's sexual impotency was related to the lesion which caused the bladder condition and was not psychogenic in origin (R. 384, 394-5—appendix, p. 16a-17a).

Obviously impressed with the testimony and knowledge of the witness, the court then questioned Dr. Hyslop to further establish the medical causative factors (R. 402-410—appendix, p. 17a-23a).

The witness ruled out any other causes for plaintiff's condition due to his perfect recovery from the first operation (R. 402-3) and expounded upon his conclusions that the plaintiff's sexual impotency was also causally related to the operation since plaintiff had a persisting impairment of bladder function (R. 404).

He explained the process which caused the plaintiff's condition (R. 405-9),[7] concluding that the bladder con-

[7]The Court did not determine the foreseeability of his bladder injury as a sequel of the delay in operation (R. 809). Implicit in this statement however, is the finding of the Court that there was such delay.

dition was permanent with treatment emergent for infections and that the sexual malfunction might be cured by an operation (R. 409-410).

The court having found that the plaintiff's condition did result from the anesthesia administered during the second operation, the causal relation between plaintiff's present condition and the treatment afforded the plaintiff as a result of his condition caused by defendant's failure to treat, was established.

POINT IV

The Jones Act, 46 U.S.C. §688, is applicable herein.

Although the findings by the court below, as a practical matter, erased distinctions in this suit between an action under the Jones Act and one under the general maritime law, it is respectfully submitted that the question of the applicability of the Jones Act herein is of prime importance since, if this Honorable Court reverses and remands this matter for a new trial, in absence of a Jones Act cause of action, the question of the retention by the district court of a suit under the general maritime law between aliens would then arise, with a possibility of denial of such jurisdiction.

The following evidence was introduced at the trial by reading the examination before trial of the defendant, Sociedad Maritima San Nicolas, S.A., into the record (R. 42-108), which evidence clearly established the American interest, domination and control of the defendant corporations by Panaghi D. Marchessini.

Marchessini resides at 61 Olive Place, Forest Hills, New York, with his wife and two sons (R. 42, 106).

Born in Greece (R. 46), he first came to the United States in 1939 (R. 46) and established his permanent residence at the above address in 1949 (R. 47).

He became an American citizen on July 12, 1955 (R. 46), his wife and two sons having become citizens in 1953 and 1954 (R. 105).

Marchessini has paid personal income tax in the United States, jointly with his wife, and taking his sons as dependents, every year since 1949, (R. 91, 106, 107). His wife and children have no personal income from any source (R. 92, 93).

Marchessini has a controlling interest in seven shipping companies:

Petmar Agencies, Inc.; Sociedad Maritima San Nicolas, S.A.; Compania de Navegacion San Salvador, S.A.; P. D. Marchessini & Co., Inc.; P. D. Marchessini & Co., Ltd.; Compania de Vapores San Antonio, S.A.; and Bedford Overseas Freighters, Ltd., (R. 43, 45).

two of which are the defendants herein.

Marchessini has his offices at 21 West Street, New York, New York, the address of Petmar Agencies, Inc., (a Delaware corporation doing business in New York), and P. D. Marchessini, Inc. (R. 58). His domination and control of these various entities is as follows:

Petmar Agencies, Inc.—he owns 60% of its stock and is its President;

Sociedad Maritima San Nicolas, S.A.—all of the stock is owned by Compania de Navegacion San Salvador, S.A., and he is its President;

Compania de Navegacion San Salvador, S.A.—he owns 40% of its stock; Helen Marchessini, his wife, owns 20%; Demetri Marchessini, his son, owns 20%; and Alexander Marchessini, his son, owns 20%. He is its President;

P. D. Marchessini & Co., Inc.—he owns 75% of its stock and is its President;

P. D. Marchessini & Co., Ltd.—he owns 60% of its stock and is its Senior Director (no officers in British corporations);

Compania de Vapores San Antonio, S.A.—50% of its stock is owned by Compania de Navegacion San Salvador, S.A.—he is its President;

Bedford Overseas Freighters, Ltd.—50% of its stock is owned by Compania de Navegacion, San Salvador, S.A., and 50% of its stock is owned by Sociedad Maritima San Nicolas, S.A.—he is a director (no officers in Canadian corporations) (R. 43-51, 108).

Petmar is in the shipping business and is connected with the charter of ships, collection of freight payments and disbursements and representation of foreign shipping interests (R. 53-54) and acts as "exclusive agent" for all the corporations in which Marchessini has an interest (R. 55, 56, 59, 64). Petmar was engaged in chartering employment by the vessels of the various companies in the United States, as well as servicing of the vessels (R. 56).

The contract in existence between Petmar and San Nicolas at the time of plaintiff's injuries (R. 58) (Plt. Exh. #3—appendix, p. 11a-12a) granted Petmar **exclusive management and operation** of the vessel (Paragraph 1 of the contract). Said contract was signed by Marchessini for San Nicolas and by Paul Ganteaume, Vice-President under Marchessini for Petmar (R. 87). San Salvador has a similar contract with Petmar (R. 89).

San Nicolas, a Panamanian corporation, has offices in Panama and Bermuda (R. 61) but conducts no business from said offices (R. 93, 94). All chartering in the United States is done through Petmar in New York (R. 94).

Marchessini stated that he, as Senior Director, President and majority stockholder of the various corporations has a "strong voice" which "carries a lot of weight" (R. 74, 75) that he "works for" Petmar as an executive in an advisory capacity and makes the decisions since his advice is sought whenever possible (R. 97).

He further stated that San Nicolas does not pay dividends but reinvests the money in the common interest of itself and San Salvador (R. 85, 86). Concluding, he further admitted that his Panamanian corporations under the Liberian flag do not pay income taxes in Panama, Liberia or the United States (R. 81, 83, 84) and that the vessels are under the Liberian flag for, among other reasons, avoidance of taxes (R. 100).

The court below held that it had determined that the defendant-shipowner corporation was an American entity and that the Jones Act was applicable—until evidence was introduced of a minority interest in the vessel by the Captain and his brother (R. 810).

It is respectfully suggested that this latter consideration is completely immaterial to the question of interest, domination and control of the defendant corporations for the following reasons:

1. The minority (18%) interest holders of the vessel were not parties to this suit.

2. The minority owners had no financial interest in the defendant corporations.

3. The vessel could not have been and was not made a party hereto under the Jones Act. See *The Black Gull*, 82 F. 2d 758, (2nd Cir.), cert. denied 56 S. Ct. 954; *The Hanley*, 29 F. 2d 110, (2nd Cir).

4. The plaintiff was employed solely by the defendant corporations and is limited to a suit under the Jones Act and the general maritime law respectively against his employer, Sociedad Maritima San Nicolas, S.A., and the party having control of the vessel, Petmar Agencies, Inc.

Thus—the sole entities to be examined on the issue of the nationality dominating and controlling the defendant shipowner were Sociedad Maritima San Nicolas, S.A. and Petmar Agencies, Inc., a Delaware corporation.

The determination by the court below on the issue of American control was incorrect as influenced by immaterial facts. Since the court held the defendant corporations to be American controlled (in the absence of said immaterial facts), it is submitted that by reason of such finding of fact the Jones Act is applicable herein.[1]

[1]This point should not be construed as a waiver by the plaintiff of his cause of action under the general maritime law. Plaintiff's position is that the instant suit may be and was grounded both upon the Jones Act and the general maritime law with all the rights and privileges of each

POINT V

Plaintiff was entitled to maintenance and cure for the period that he was under medical treatment and until such time as he attains maximum medical benefits.

The court below determined that the plaintiff was entitled to maintenance and cure until his discharge from out-patient treatment at the Marine Hospital, Staten Island, New York (R. 820) and denied such maintenance and cure for further periods solely on the ground that the plaintiff declined to return to the Marine Hospital for the treatment that was required to arrest the progression of his condition and for further surgery (R. 820).

Plaintiff was not discharged as cured since he was required to return in January 1953 (R. 555). His failure to do so was due to fear (R. 555).

The parties stipulated that $8.00 per day was the prevailing rate of maintenance and cure for American ships (R. 433).

The plaintiff returned to work for the first time after the operations on May 15, 1954 (R. 434), as a typist and earned $1,375.00 from that date until October 15, 1954. Plaintiff was next employed in January, 1955 as a grocery clerk, earning $52.10 per week until October 10, 1955 and $56.30 per week thereafter (R. 435).

There was no denial that plaintiff required catheterizations for his condition and will require them for some time in order to arrest the progressive nature of his condition, nor that infections will develop, which will necessitate treatment. (R. 403, 409—appendix, p. 13a, 23a).

Dr. Hyslop testified that an operation exists which may cure the plaintiff's sexual impotency.

Thus plaintiff has not attained maximum medical benefit.

In *Calmar S.S. Corp. v. Taylor*, 58 S. Ct. 651, the Supreme Court considered the question of the extent of maintenance and cure. The Court determined that a lump sum for life could not be granted but that the duty to pay such monies would extend beyond the termination of the voyage for a reasonable time.

The question before this Honorable Court with respect to this issue is whether plaintiff's refusal to return to the Marine Hospital for further treatment was reasonable under all the facts and circumstances.

In *Luth v. Palmer Shipping Corp.*, 210 F.2d 224, the Court of Appeals (3d Cir.) stated its position in this manner:

> "It is true, as contended by respondent, that 'seaman's right to maintenance and cure is forfeited by voluntary rejection of hospital care.' But as we pointed out in *Murphy v. American Barge Line Co.*, 3 C.A., 1948, 169 F.2d 61, 64, certiorari denied 1948, 335 U.S. 859, 69 S. Ct. 133, 93 L. 60, 406, *the rule is not inexorably applied; other factors present must be taken into account and given effect.* Thus, in the *Murphy case* we held that it was the shipowner's duty to furnish a seaman transportation to a distant hospital and that since it did not do so the seaman's failure to avail himself of hospitalization did not amount to a refusal of treat-

ment precluding his recovery for maintenance and cure." (Italics ours) (p. 228)

In view of the extremely poor results from the second operation it is respectfully submitted that plaintiff's refusal to return to the hospital for further treatment was a reasonable one.

Whether maintenance and cure is due and owing is not a question of where the treatment is afforded the injured seaman but rather whether it is necessary and proper until such time as he attains maximum medical benefits.

The decision of the court below should be modified and maintenance and cure awarded the plaintiff for all periods to date, from the date of sign-off from the vessel, less moneys earned as a clerk, in-patient periods at the Marine Hospital and any sums heretofore given the plaintiff by the defendants.

POINT VI

Plaintiff is entitled to wages until the end of the voyage. Farrell v. United States, 69 S. Ct. 707.

Defendants Exhibit B, the crew list, revealed that the voyage terminated in Italy on July 24, 1953.

Plaintiff signed off the vessel because of his medical condition on July 4, 1952.

His earnings had been 70 pounds per month (R. 541).

He was thus entitled to unearned wages from July 4, 1952 to July 24, 1953, a sum total of 866.67 pounds, equivalent to $2,482.68.

It is respectfully submitted that the plaintiff has now due and owing to him the above stated sum, less any unearned wages previously received.

The court below failed to grant any sum for wages.

POINT VII

The issue of validity of an alleged "waiver" is not before this Honorable Court for determination.

The court below having expressly declined to determine the question of validity of a document stated by the defendants to be a "waiver" (R. 812), appellant respectfully submits that the issue is not before this Court at this time.

CONCLUSION

Appellant respectfully requests that this Honorable Court reverse the judgment of the court below and remand this cause to said court solely on the issue of foreseeability of the plaintiff's condition as a result of defendants' failure to treat and on the question of damages resulting from said failure, for maintenance, cure and wages or, in the alternative, that this Honorable Court determine and fix the amount of recovery to be had by the plaintiff by reason of the law and facts as set forth above.

Respectfully submitted,

JACOB RASSNER,
Attorney for Appellant

HARVEY GOLDSTEIN,
Of Counsel.

APPENDIX

United States Court of Appeals
For the Second Circuit

CONSTANTINE MACRIS,

Plaintiff-Appellant,

against

SOCIEDAD MARITIMA SAN NICOLAS, S.A. and PETMAR AGENCIES, INC.,

Defendant-Appellees.

Statement Under Rule 15(b)

This action for money damages arising out of personal injuries to a seaman is predicated upon the Jones Act, 46 U.S.C. § 688, and the general maritime law.

The action was commenced by filing the complaint on December 12, 1952. Issue was joined on January 10, 1953.

A preference was granted in June, 1955.

The cause came on for trial before Honorable Lawrence E. Walsh, without a jury, on October 25, 26, 27, 28 and 31, 1955.

The first cause of action was dismissed and recovery granted on the second cause of action on October 31, 1955.

An opinion order on reargument affirming the prior determination was filed on December 31, 1955.

Judgment was entered on January 18, 1956.

Notice of appeal was filed on January 31, 1956.

Plaintiff's previous attorneys were Sendler & Tryfores, 33 West 42nd Street, New York, New York. Jacob Rassner, 15 Park Row, New York, New York, was substituted as plaintiff's counsel.

Renato C. Giallorenzi, 50 Broad Street, New York, New York, is the attorney for the defendants.

Except as above stated there has been no change of attorneys.

COMPLAINT

(Record Page 663-667)

Plaintiff Demands A Jury Trial

Action under special rule for seamen to sue without security or prepayment of fees, for enforcement of laws of the United States, protection of health and safety at sea.

Complaining of defendants, plaintiff alleges upon information and belief:

FOR A FIRST CAUSE OF ACTION:

1. Plaintiff is a resident of the City and State of New York, of Greek nationality, and licensed as a mate of merchant vessels.

2. Defendant Sociedad Maritima San Nicolas, S.A. is a Panama corporation organized and existing by virtue of the laws of the Republic of Panama, and doing business through its agent defendant Petmar Agencies, Inc., with an office at No. 17 Battery Place, in the Borough of Manhattan, City of New York.

3. Defendant Petmar Agencies, Inc. at all times herein mentioned was and still is a domestic corporation organized and existing under the laws of the State of New York, and acting as agent for defendant Sociedad Maritima San Nicolas, S.A., with offices and place of business at No. 17 Battery Place, Borough of Manhattan, City and State of New York.

4. At all times herein mentioned, defendants owned, operated, managed and controlled the S.S. Euryviades, a merchant vessel.

5. At all times herein mentioned, plaintiff was in the employ of defendants on board the said vessel Euryviades as second mate at the rate of wages of $196.00 per month and board and lodging, having signed articles therefor at Baltimore, Maryland on April 7, 1952, and having continued in said employ through July 7, 1952.

6. When signing articles as aforesaid, and continuously thereafter while in the employ of defendants, plaintiff was to the knowledge of defendants sick, lamed and disabled through no fault of his own, but entirely through the fault of the defendants, their agents, servants and employees, in failing to furnish him with a safe place in which to work and to provide him with a safe and seaworthy vessel, and tools and appliances therefor, and in failing to provide him with competent co-employees and superior officers, and in failing to promulgate, maintain and observe proper and safe rules and regulations for plaintiff's safety.

7. Defendants specially induced plaintiff to sign articles as aforesaid by assuring plaintiff that he would be called upon to perform only light and supervisory duty.

8. During the time aforesaid, following such signing of articles, defendants required plaintiff to perform not only the regular duties of second mate, but also the duties of an ordinary seaman, without limitation and without consideration for the sick, lamed and disabled condition of plaintiff aforesaid, and in disregard of the inducement aforesaid extended to plaintiff to sign articles.

9. During the time last aforesaid, defendants negligently, by their agents, servants and employees, failed to furnish plaintiff with a safe place in which to work, or to provide him with a safe and seaworthy vessel, or tools and appliances therefor, or to provide him with competent co-employees and superior officers, or to promulgate, maintain and observe proper and safe rules and regulations for plaintiff's safety; and defendants failed to provide plaintiff with dry, warm and sanitary quarters in which to live while on board the said vessel Euryviades

10. In consequence of the foregoing, plaintiff's sick, lamed and disabled condition was by defendants' negligence aggravated and rendered more serious and grievous in degree, and plaintiff was caused to suffer, and continues to suffer pain and disability, and has been confined to his home and bed, or to a hospital for care and treatment, both medical and surgical, appropriate to the aggravated condition aforesaid, viz, bilateral inguinal hernia with involvement of adjacent organs, cystitis, and consequent impairments of bodily functions, by reason of which plaintiff's capacity to earn a living has been impaired for a long time to come, if not permanently.

11. In consequence of the foregoing, plaintiff has lost, and will continue to lose large sums of money which he otherwise would have earned, and has paid out, and will have to pay out large sums of money for his board and lodging, all to his damage in the sum of $50,000.00.

12. The jurisdiction of this Court is predicated upon a Federal statute, namely, the Jones Act (46 U.S.C. §688), and upon the General Maritime Law of the United States.

13. By reason of the foregoing, plaintiff has been injured and damaged in the sum of $50,000.00.

For a second cause of action repeating and realleging each and every prior allegation hereof, plaintiff further alleges:

14. Under the General Maritime Law of the United States plaintiff is entitled to Maintenance and Cure, and to his hospital and medical bills for a reasonable period of disability, and to his wages to the end of the voyage, in the sum of $50,000.00.

WHEREFORE, plaintiff demands judgment against the defendants in the sum of $50,000.00, on the first cause of action, and in the further sum of $50,000.00, on the second cause of action, being $100,000.00 in all, together with the costs and disbursements of this action.

SENDLER & TRYFOROS
Attorneys for Plaintiff
Office and P. O. Address:
33 West 42nd Street
Borough of Manhattan
City of New York (36)

[SAME TITLE]

Pltff. Exh. 7

U. S. Dist. Court, S. D. of N. Y., 26 Oct. 1955.

B. V. KELLY, M. D.
National Marine Bank Building
BALTIMORE 2, MD.
U. S. A.

April 7, 1952.

Constantine Macris
Liberian S. S. Euryviades
Second Officer.

The above named, complains of pain in the lower abdomen, upon the slightest exertion, and of late is so severe,

that the patient is forced to stop work, and at times is unable to work for the rest of the day.

Examination shows a right and left inguinal herniae, and from the history and examination, show obstructive signs, which demand operation, as soon as time permits.

s B. V. KELLY, M. D.

April 9, 1952.

To DOCTOR B. V. KELLY, Dr.
National Marine Bank Building
Baltimore 2, Md., U. S. A.

Liberian S. S. Euryviades & Owners
ACCIDENT CASE
Constantine Macris
2nd. officer
Right & left inguinal herniae.

Examination of the above named shows as the result of accidental origin while in the course of his regular duties, a right and left inguinal hernia, which causes patient much pain, and at times loss of time from his duties. He is afraid of strangulation, and probable gangerine, and wishes operation as soon as possible. Patient should be operated upon as soon as conditions permit.

Examination on board. 10.00

PAID by check No. 3451

Pltff. Exh. 9

Sept. 23, 1954

Re: Macris, Constantine
3538 - 34 Street
Astoria, L.I. - NY
Vs: SS "Euryviades"
Incident August 1952

Mr. T. N. Janis
J. C. Monroe
76 Beaver Street
New York, N. Y.

Dear Mr. Janis:

The above named 36 year old married chief mate was examined at my office this afternoon, September 22.

Apart from the fact that he is not fluent in English so that I did not attempt to get a detailed history not related to the present problem, there was no difficulty.

In August 1952 a right inguinal hernia was operated upon under spinal anesthesia and a couple of weeks later similar anesthesia was used when a left inguinal hernia was repaired.

The patient had no sensory or motor paralytic symptoms involving his trunk or lower extremities but from the time of the second operation and until four days later he was unable to empty his bladder and had to be catheterized. There was no disturbance of rectal function.

After he got home from the operation, he became aware of impairment of physical sexual capacity — incomplete erection and reduced sensation and ejaculation.

A month after the second operation he had transient pain in the upper lumbar region of his back on both sides.

From time to time he develops urinary retention and has to be catheterized. This symptom has led him to avoid returning to sea, on the ground that if such an emergency occurred, there would be no one available to catheterize him.

His impaired sexual function has led to domestic difficulty and he has had to ask his wife to be patient and put off her intention to seek a divorce. A Dr. Fiedler proposed an operation to correct the sexual difficulty, but the patient has no funds to pay for the surgery.

About a year and a half ago the patient began to have eposides of headache and dizziness, occurring every week or two.

The patient is otherwise without complaints and stated that prior to both operations he had excellent physical health.

In 1945 he acquired gonorrhea and recovered quickly without complication. He denied syphilis.

On a brief examination I found no evidence of syphilis of the nervous system and absolutely no motor, sensory or reflex disturbance of function in the lumbar and sacral segments.

I have noted the report of Dr. William L. Ferber whose survey revealed an atonic bladder with residual urine of from 12 to 14 ounces. The kidneys were normal.

This patient's bladder and sexual function defects are to be regarded as a complication of spinal anesthesia. Whether the needle used for the anesthesia actually penetrated the conus medullaris and injured the second to fourth sacral segment tissues controlling urinary function, or whether there has been a restricted and specific reaction to the anesthetic substance itself, cannot be stated. There is, in my opinion, no ground to regard the sexual defect as psychogenic, since the condition would naturally be associated with the organic lesion causing the atonic bladder.

I am surprised that none of the doctors who have studied this man have seen fit to train him in the use of a catheter. I believe that he is intelligent enough to be given such instruction, which would enable him to resume going to sea.

Not long ago one of the senior genito-urinary surgeons in New York City described an operation to correct the type of sexual function defect this patient has. Other surgical measures to deal with the bladder defect are outside of my province and knowledge.

Enclosed is the report of Dr. Ferber.

A review of the marine hospital records might give information requiring some modification of my opinion.

Sincerely,

s GEORGE H. HYSLOP, M.D.
129 East 69th Street
New York 21, N. Y.

CHH:EJ
Encl.

Pltff. Exh. 3

U. S. Dist. Court, S. D. of N. Y., 26 Oct. 1955.

Memorandum of Agreement dated the 3rd day of January 1950 between Petmar Agencies, Inc., a Delaware corporation of 17 Battery Place, New York City, hereinafter called the "Agent", and Sociedad Maritima San Nicolas S. A. of Panama City R. P., a corporation organized under the laws of the Republic of Panama hereinafter called the "Owner",

WITNESSETH

Whereas the Owner is the owner of a steamship, of the Liberty Dry Cargo type, called the "EURYVIADES", documented under the flag of Honduras, and desires to give the exclusive management and operation of said vessel to the Agent for a period of one (1) year from 1st January 1950 and the Agent is ready and willing to undertake the management and operation of said vessel.

Now, therefore in consideration of the mutual covenants herein contained and other good and valuable considerations, the parties hereto agree as follows:

1. That the Agent shall have the exclusive management and operation of said above-mentioned vessel for a period of one (1) year from 1st January 1950, and the Agent's compensation therefore shall be the sum of FIVE HUNDRED ($500.00) DOLLARS per month, including any lay-up periods, in addition to a commission of two and one-half (2½%) percent of gross freights, demurrage, dead freight, and all other charter fixtures compensation earned by the vessel during the period of this agreement.

2. That, unless the usual fittage is allowed by the contracting companies, the Owner will pay to the Agent such fittage on bunkers which, however, is not to exceed the rate of Eight ($.08) cents per barrel for such bunkers.

3. That whenever the presence of the Agent's Port Engineer, Paymaster, Port Captain or Chief Stewart is necessary, advisable or desirable at a port other than the Port of New York upon the arrival of said vessel, the Owner will pay all of the expenses and disbursements for and in connection with the personal attendance to the vessel by any one of the above-mentioned employees of the Agent.

4. That the Owner will at all times maintain with the Agent sufficient credit for the estimated cost of overseas expenses and disbursements for bunkers, port dues, agency fees, and other disbursements, paid or incurred at overseas ports.

5. If any loans at any time are advanced by the Agent to the Owner the amounts so loaned shall bear interest at the rate of four (4%) percent for the period during which they remain unpaid.

In Witness whereof, the foregoing agreement has been signed and executed by the parties hereto the day and the year above written.

Sociedad Maritima San Nicolas S. A.
By P. D. Marchessini

Witness
Macris

Petmar Agencies, Inc.
By Paul A. Ganteaume

Witness
S. M. Maloney

MINUTES

(Record Pages 370; 374-375; 377-378; 378-379, 395; 384, 394-395; 402-410)

(R. 370)

A He had a neurogenic bladder. In other words, there was damage to cord centers for bladder and some other similar segmental function as a byproduct of the anesthesia used in the operation.

Q Would you say that that was the direct sequelae of the operation? In other words, put it another way, was the operation a competent producing cause of the conditions which followed?

A Yes, the anesthesia was the primary culprit.

(R. 374-375)

Q Doctor, assume that this man's condition was such as is described in these various records, which I now will specifically call to your attention:

That his condition on the 17th day of January, 1952, was as described in Plaintiff's Exhibit 4; that on or about the 7th day of April, some two or three months later, his condition was as described in Plaintiff's Exhibit 2; assume that he continued to do work of a manual nature, such as is usually performed by an able-bodied seaman, including the painting and handling ship's gear and chipping of paint; assume that his condition by the time he entered the hospital was as described in Plaintiff's Exhibit 1;

Can you say with a reasonable degree of medical certainty whether the delayed treatment was an aggravating cause in this man's condition?

MR. GIALLORENZI: My objection to that is only one, and that is the amount of work which the plaintiff did during that period, manual work which Mr. Rassner was referring to.

MR. RASSNER: If the doctor can't state, we will add further, but I am asking the doctor if he can give an opinion on those facts as related.

A In answer to your question, it depends upon two things; one, whether examination findings on either of these three dates, January '52, April '52 and on admission to the hospital, enable one to judge whether there had been any change in the hernia found. What is recorded does not enable an opinion on that.

Q Well, can you tell us whether that delayed treatment is a competent producing cause of an aggravation?

A As a hypothetical thing, it can conceivably be, yes, certainly.

Q Then on a hypothetical basis, you say it is a competent producing cause, with a reasonable degree of medical certainty?

A It could be.

(R. 377-378)

Q Assume that in addition to the facts which I had given you, and referring to the various exhibits including 2, 7 and 1, and assume further that the man had increasing difficulty as time went by during the interval of time, would those facts enable you to give an opinion as to the causal relationship of the delayed treatment to an aggravated condition?

MR. GIALLORENZI: I object to this question.

THE COURT: What kind of an aggravating condition?

MR. RASSNER: To cause the hernia to be more extensive and require more extensive repair.

THE COURT: All right.

MR. GIALLORENZI: I object to that, your Honor, because the doctor has already answered "I don't know."

THE COURT: Well, he answered that on another question. I will overrule your objection. He can say it again if he wants to, but read the question back to the doctor and we will get his answer.

(Question read)

A That could be admitted, certainly.

Q Is that your opinion, doctor, with a reasonable degree of medical certainty? I use the words "reasonable degree of medical certainty" advisedly.

A It would be reasonable to feel that they had been adversely affected by procrastination.

(R. 378-379, 395)

Q Will you describe what atony of the bladder musculature is?

A It means the lack of tone in the muscles due to improper nerve supply.

Q And is that the direct sequelae of the anesthetic administered in the operation, including the effect of the operation itself?

A It is the effect of the anesthetic on centers in the spinal cord.

Q And how does that type of condition manifest itself, if at all, with relation to the kidneys? What if anything does it do?

* * * * *

A You are referring to the atony of the bladder?

Q Yes, sir.

A It predisposes eventually to a complicated involvement of one or both kidneys.

* * * * *

Q In other words, at the time that you examined him you felt that his condition was either due to a penetration of the needle in the spinal cord or the anesthesia itself?

A Either mechanical or chemical damage from the spinal anesthesia.

Q Or possibly damage to the spinal cord by the needle?

A That's right. I said mechanical or chemical. I said the conus medullaris, which is the lowest portion of the spinal cord and has to do with the sacral segments.

(R. 384, 394-395)

Q There was some testimony here that there was some psychogenic tendencies which were a contributing factor in the impotency or partial impotency or inability to have

an erection, sustain the erection, or to indulge in marital relations with his wife. Let's have the benefit of your opinion, based on your examination.

A Well, it was my opinion that his impotency was related to the lesion which caused his atonic bladder and it was not psychogenic in origin.

* * * * *

Q And that all your opinion, insofar as the impotency of this plaintiff, is primarily based on what he told you?

A No, he had the objective signs of an atonic bladder, and a person with an atonic bladder, you need not be surprised to find developing the type of physical functional defect and sexual activities that he described.

(R. 402-410)

BY THE COURT:

Q We have had testimony here which, in very crude terms, ranges from an opinion of a perforation of the spinal cord to an opinion that this bladder disturbance is caused by a chronic prostate difficulty.

Now, apparently you have ruled out the latter and concluded that he had — that here the spinal cord was damaged mechanically or by chemical intrusion.

Could you give me the reasons for your conclusion in a way that I can understand?

A Prior to the second operation, the story was of no disturbance of function involving the segments or the organs which made trouble immediately after the second operation. The cystscopic study of the man on September

10th or 19th, I believe, before he left the hospital, and about three weeks after his second operation, showed a normal prostate as to size, no obstruction of the urethra and no involvement of the floor of the bladder that would cause a mechanical difficulty that would lead to residual urine and a gradual secondary loss of tone of the bladder wall.

In other words, he did not have the obstructive mechanical prostate basis. He did show, as shown in his urinary, an infection complication of this retention process. He did get some infection in the prostate and that has been found in later examinations, varying from time to time, but at no time has his prostate — and I think the last examination in that regard was in the spring of this year — at no time has his prostate shown obstructive effects on the urinary pathway that would cause such bladder defect as was found in this man early in the game. So between no mechanical and no infective involvement of the prostate in August and September, 1952, I felt that there was no preoperative background which would predispose him to such a complication of the operation, whether it is spinal anesthesia or anything else that may have caused the complications.

Does that answer your question?

THE COURT: Yes, sir; I think that does.

Q One more question: You rule out psychogenic factors as a cause of this difficulty in completing sexual intercourse. Would you tell me again how you do that?

A My main reason was that he had been demonstrated to have a persisting impairment of bladder function, which

would be consistent with a physical basis for a comparable sexual functional disturbance. There was nothing about the man, as I could get it from his behavior and the way he cooperated, that implied emotional instability, that would make a sexual disturbance primarily psychogenic.

I don't question that there is a byproduct of some physically-based sexual function disturbance. There was emotional tension, instability from conflict with his wife. That would be a form of psychogenic, but not pathological response.

Q Now, will you explain to me, as an uninformed layman, how the damage to the bladder muscle nerve occurred? In other words, what the chain of events must have been from the injection of the anesthetic, and how that works.

A In the first place, the anesthesia is inserted inside of what is called the spinal canal. You are familiar with what that is?

Q No, sir. I should know, but I would much rather you tell me what it is so that I will be familiar with it.

A May I rub out some of that picture (indicating blackboard)?

MR. RASSNER: We won't need it any more.

THE WITNESS: I won't complicate it.

THE COURT: Don't worry about me. I would like to be informed, complicated or otherwise.

A (Demonstrating on blackboard) That circle represents the membranes surrounding the wall of what is

called the spinal canal, meninges. Inside the spinal canal is the spinal cord. The needle injecting the anesthesia penetrates the outer membrane, and this fluid fills this canal, except for the tissue of the spinal cord itself. That fluid injected, the local anesthesia will temporarily put to sleep the spinal cord subjected to it, which absorbs what is in the fluid around it, and we don't know — there have been plenty of theories — we don't know why in a given case a spinal anesthesia, even where you are sure there has been no mechanical reason for it, there is no penetration by a needle, we don't know what does it.

Q Now, where was the injection made in this case? I thought I had a note of it, but I don't. It was down in the sacral 3 and 4, wasn't it?

MR. RASSNER: We have that here. We have a complete record of it.

THE COURT: As I remember it, it was below the lowest point of the cord.

MR. RASSNER: Yes.

A Lowest expected point of the cord.

THE COURT: I see, yes.

MR. RASSNER: May I have this copy of the blackboard diagram put in evidence?

THE WITNESS: There are the numbers 3 and 4 for space. That is presumably between the third and fourth lumbar vertebrae.

Q Third and fourth lumbar vertebrae. Now, how does the location of the point of injection bear — as I remember it, the nerve affected —

A Let that be the body of a vertebra, spinus process sticking out this way, the first, second, third and fourth lumbar vertebrae. The center of the spinal cord may rest anywhere from here to here. Now, if you put that needle at this point, the spinal canal is fairly wide at this level, and if you put that needle at this point, the vertical plane, and stop it as soon as you get through the membrane, there is practically no chance that you do damage to the tipped end of the spinal cord, if it is that far down. If you are shoving hard from resistance and the thing goes through faster than you realize it, it may temporarily get far enough to scratch the surface. If your needle is playing up this way, and your spinal cord ends there, the same thing may occur.

The shape of the patient's back, the ease in getting in, the length of the needle, the diameter of the needle — all those things, and the experience of the man doing it, enable him to know with reasonable certainty an opinion as to whether his insertion of the needle may have done trouble, may have done tissue harm.

Q All right. Now, one thing, doctor, while you are still down there. Supposing a needle doesn't make contact with the end of the cord, how else could it do damage to the bladder nerve?

A By chemical.

Q The chemical that does the damage would run up along the canal?

A It is absorbed in the spinal canal at that level and

it gradually dissemanates. Eventually it gets higher, although no higher than the mid-thoracic region, but the main effect is on the portion of the cord nerve and there is temporarily a loss of function of the spinal cord. There have been animal experimental work which indicates in some animals the toxic reaction to the absorption of this fluid. Some cells become congested and may be harmed.

Q In other words, this spinal anesthesia was designed to operate on the cord?

A No, it was designed to do certain operations.

Q I mean, in other words, it was intended to affect the cord?

A That's right.

Q That is, for inserting the needle?

A Yes.

Q The idea was to insert the needle below the end of the cord into the canal, so that the fluid may carry the chemical up to the part —

A To the part of the cord you are interested in. If you are interested in the cord at this level, you are doing a gall bladder, you may combine spinal and general operation, you tip the patient head up and feet down. If you are working on the prostate you will not put the patient's head down; you will keep the fluid concentrated as low as you can. Here is a man having a hernia operation. He was horizontal. If they put in an adequate amount of that, they don't want to get it higher up because it would cause difficulties in respiration and they don't want to get it below that. So they keep the patient with his head not lower, so that the absorption of the fluid is limited to

the smaller area — its effect is limited to the smaller area of the spinal cord.

Q All right, sir. One other thing I would like is your opinion, if you have one, as to permanency or lack of permanency, as to this condition.

A The bladder defect, as far as I know — I say, as far as I know, and the GU men are always coming up with something now and then — as far as I know, you can't correct it. The man can keep track of his urinary pathway and if he gets infective symptoms, get busy with it. As far as sexual function disturbance is concerned, there have been in the last two or three years operations devised that have been reasonably successful in correcting this particular functional defect.

Q But the nerve to the muscle of the bladder?

A There is no way of fixing that, that I know of. There are no nerve grafts that I know of. Now, what they will do twenty years from now, I have no idea.

THE COURT: All right, sir. Thank you very much, doctor.

[SAME TITLE]

MEMORANDUM
(Record Pages 806-813)

WALSH, D.J.

THE COURT: I will tell you, let me make my comments and that will give you both something to shoot at. Let me start off with the motion addressed to the amendment of the pleadings. I am going to deny that motion. In the first place, I think the plaintiff has proceeded primarily on the basis of what had happened between Baltimore and New York anyhow. In the second place, I don't see any foundation, surprise or otherwise, which would justify changing the pleadings at this late date.

I am going to the merits, and I think I must conclude that there is no basis for recovery here except for maintenance and cure, and I will try to trace my reasoning.

The hernia occurred in Bremen. I don't think, under the pleadings, that what occurred before Baltimore is important except in so far as it explains what the various parties did in Baltimore; but I don't think, in any event, there was any proof here of any negligence or unseaworthiness of the vessel in Bremen. I think that a second mate on any vessel must be expected to be able to pick up a line and heave on it or lift it, and whether that is his ordinary duty or not, he cannot say that he has been put to some unanticipated or unreasonable task which would make the vessel liable if, through no one's fault, he suffers a hernia.

What gives me the most trouble, and I think that underlies fundamentally my conclusion, is that I think his hernia was just about as bad when he got to Baltimore the first time as when he got back to Staten Island for treatment. I think it did progress and get worse between Bremen and Baltimore, and at Baltimore it was described as a double hernia and we have a recommendation for an operation, not emergent but that it should be had as soon as time permits.

I don't recall anything in the record, and I listened carefully, and I have gone over my notes day by day, and I have been over them all again at the conclusion of the trial, I don't recall any proof that it got worse between Baltimore and his return to New York, other than the plaintiff's subjective feeling that he was getting worse. I don't recall anything which shows that the condition changed between Baltimore and New York. Dr. Hymes speculated that because the plaintiff was able to work when he went to Korea and needed an operation when he got back to New York that there must have been a change. Frankly, I think Dr. Hymes' speculation or his conclusion was not on very firm ground. Of all the experts, he was the only one whom I felt was a little bit reckless in some of his answers, and I don't give any weight to his opinion in that respect, that he speculates on that basis that the hernia worsened during the voyage. And I am not giving any weight to plaintiff's own subjective feeling that it got worse, and I don't recall anything else in the record on the subject.

The doctor who examined him here for the defendant said that even when he arrived in New York, just before his operation, he was capable of continuing to work. In fact, I cannot see anything different in his appraisal of the

hernia and that which was obtained at the Baltimore Marine Hospital and before Dr. Kelley in Baltimore.

Because of that, we don't get to the more difficult questions of the foreseeability of his bladder injury as a sequel of the delay in operation. Both Dr. Hyslop and Dr. Keating say that there really is no correlation, at least science has not been able to develop one; Dr. Keating says there is no correlation between successive operations and this kind of sequel, and Dr. Hyslop said there is no correlation between the amount of this drug administered and this kind of sequel. Dr. Keating did say there was a correlation between the amount of other types of drugs and comparable sequelae. However, this whole question would confront me only if I had concluded there was some change in the physical condition of the hernia between Baltimore and Staten Island. And if I had reached this point, then I would like briefs from counsel as to liability for unforseeable injury, but I don't think we get to that point, so I am not going to bother you or burden you with the request for briefs.

As to the nature of plaintiff's injury, I think that this man suffered from an atony of the bladder but, with the greatest respect for the defendants' expert, I don't attribute its cause to chronic prostatitis. I follow Dr. Hyslop's conclusion that it somehow resulted from the anesthesia administered on the second operation.

Because of my conclusion that there was no significant change in plaintiff's condition after his re-employment in Baltimore, under the present pleadings, it really doesn't make much difference whether we are under the Jones Act or the general maritime law. Until I heard Captain Dra-

catos testify that at the time of this voyage he and his brother were part owners of this vessel and that there was thus ownership outside of the Marchessini family, I had intended to follow plaintiff's contention and treat this as though it were an American defendant and to hold that the action was properly under the Jones Act. Now, in view of the fact that others had a beneficial interest in the vessel, I think I will give greater respect to the form of the corporate setup and treat it as a Panamanian owner in fact as well as in form and, therefore, I will apply the general maritime law.

In any event plaintiff is entitled to maintenance and cure to the point of maximum cure. Actually, we don't have much in the record to help me compute that. Certainly, as to his sexual difficulty, Dr. Hyslop and experts on both sides, said that he hasn't reached his point of maximum cure and he is entitled to it. I will leave that to computations to be submitted to me by counsel or however you think best.

Just one thing before we leave. This is out of place and it goes back to Baltimore. As a matter of fact, I haven't even discussed the question of waiver because I haven't reached that point, but I would like to make clear one thing: I do not believe that the plaintiff was overreached. I don't give weight to that part of his testimony which suggested that he was. Again, I am not sure that it is a question of dishonesty. I feel that the plaintiff at times has manifested a simple-mindedness and a lack of maturity in his appraisal of events, for example relying on gossip of soldiers as to the adequacy of hospital conditions in Pusan and, also in his own suspicion as to what went on with respect to the Immigration officials in Baltimore. I

don't see anything in the record which justifies a conclusion that defendants tried to overreach him. I think they honestly tried to get him prompt medical attention and that they were certainly willing to return him to Greece for an operation, as he wished. Although, perhaps, they weren't ready to meet every whim he had, they tried to accommodate him, certainly to all reasonable lengths.

The waiver, regardless of its nature as a defense in itself, satisfied me that defendants were not trying to get plaintiff to continue his service with them at all costs. Its language shows a pretty tough attitude towards the plaintiff not any dishonest attempt to minimize his impaired physical condition in order to get him to continue in the ship's service. It was pretty blunt. It made it clear that he could come along on the voyage if he really wanted to but at his own risk. This was spelled out to the point of warning him that his compensation would be reduced to the extent that others had to perform his duties for him.

I realize that in giving legal effect to the waivers by seamen, we look at them with the greatest care and even suspicion. I think this waiver would stand up under such scrutiny but, because of my view on the underlying question of liability, I don't have to decide this question. The waiver does, however, reflect on the plaintiff's credibility to the extent that it shows that there was no overreaching in Baltimore and it supports the credibility of the ship's captain to that extent.

(Discussion between Court and Counsel)

MR. GIALLORENZI: I would like something noted on the record about these motions. As I understand it the Court gave a decision, that you are not reserving decision?

THE COURT: No, I haven't reserved decision.

MR. GIALLORENZI: You have given your decision?

THE COURT: I have given my decision. Mr. Rassner thinks I am in error on certain points. He wants to, by brief or reargument, show me those errors, and I have said, "By all means, do so." He wants until two weeks after he gets the minutes. I would like to have it sooner than that.

(Further discussion between Court and Counsel).

/s/ LAWRENCE E. WALSH
United States District Judge

Dated: October 31, 1955.

[SAME TITLE]

OPINION
(Record Pages 814-820)

WALSH, D.J.

This was an action by a seaman against his employer to recover for disability resulting from effects of anesthesia administered in an operation to repair a hernia. He claimed that the hernia had been aggravated by acts and omissions of the defendants during a voyage from Baltimore, Maryland to Japan and return to San Francisco, and that this aggravation made necessary two operations instead of one and thereby caused the disability complained of. At the close of the case, his claim was dismissed for failure to prove any change of condition during the voyage. Thereafter, he sought to amend his complaint to state a claim for the original hernia and its aggravation during the voyage prior to arrival in Baltimore.[1] This motion was denied and plaintiff now seeks reargument.

Plaintiff is a Greek national; defendant Sociedad Maritima San Nicolas, S.A., a Panamanian Corporation; and defendant Petmar Agencies, Inc., a Delaware Corporation. The vessel on which plaintiff was employed is of Liberian registry.

Plaintiff was employed in Greece as Second Mate. From

[1]At the close of his case, before the ruling of the Court, plaintiff's counsel moved perfunctorily to conform the pleadings to the evidence but declined to state in what particulars amendment was sought.

there the vessel sailed to Bremen, Germany; Santos, Brazil; and then to Baltimore, Maryland. In Bremen, plaintiff sustained a hernia. He was examined there and in Santos. In Baltimore he signed off the vessel for return to Greece for treatment, but, faced with a few days detention at Ellis Island awaiting the ship to carry him to Greece, he, at his own request, signed back on and made the trip from Baltimore to Japan and back to this country.

Plaintiff limited his claim to aggravation of his condition after his re-employment in Baltimore. By so doing he believed that he strengthened his contention that this Court should assume jurisdiction of the subject matter and that the Jones Act was applicable. This position was maintained consistently throughout the trial. Plaintiff did offer proof of the prior events at Bremen and Santos, but this proof was received solely upon the issue of defendants' duty subsequent to re-employment in Baltimore—not as to possible fault of the defendants in Bremen or between Bremen and Baltimore. Defendants objected to its receipt for any purpose. Plaintiff acquiesced in the Court's limitation. He did not at that time seek to amend his complaint.

Plaintiff's motion to amend, at the close of the trial, was made under Rule 15(b), as a motion to conform the pleadings to the evidence. This was not a proper case for amendment under Rule 15(b) because proof had not been taken as to the claim attempted to be added to the complaint, except as incidental to other matters.[2] Even to this

[2]Indeed there was no proof of lack of seaworthiness of the vessel or negligence of defendants. Plaintiff was Second Mate. While tying up to the pier in Bremen, plaintiff was in charge of the crew on the stern. One line had been put ashore and was taken to the niggerhead of the winch. A second line was put ashore and it was necessary to heave in the slack by hand. Plaintiff, at the direction of the master, joined with the crew

extent it was taken not with the express or implied consent of the defendants but over their objection.

With respect to amendments under this subdivision Professor Moore says:

> "The purpose of an amendment to conform to proof is to bring the pleadings in line with the actual issues upon which the case was tried; therefore an amendment after judgment is not permissible which brings in some entirely extrinsic issue or changes the theory on which the case was actually tried, even though there is evidence in the record—introduced as relevant to some other issue—which would support the amendment. * * *". 3 Moore's Federal Practice 846-47.

Simms v. Andrews, 10 Cir., 118 F. 2d 803, 807, held that amendment of a pleading under comparable circumstances was not proper. The court said:

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in pulling on the line and in the course of this work sustained his hernia. There was no claim that the crew was inadequate. The claim of fault in so far as the causation of the injury was concerned apparently is that plaintiff was required to do something which was not the duty of the Second Mate, a claim supported only by plaintiff's own opinion.

After the plaintiff's injury was disclosed, the master had him examined by a doctor in Bremen. The doctor found that the plaintiff had the beginning of a hernia on both sides. An immediate operation was not recommended. At the next port of call, Santos, Brazil, plaintiff was again examined by a doctor who recommended the wearing of an elastic belt which was purchased for plaintiff and worn until he arrived in Baltimore. When examined in Baltimore both by a private physician and the Marine Hospital, plaintiff was found to have a double hernia ready for operation but not one for which operation was emergent. He was found fit for light duty.

Neither the medical records nor the other proof gives any basis for concluding that the treatment and examination the plaintiff had received to that date was inadequate or improper. The wisdom of withholding an immediate operation was not litigated, although one of plaintiff's medical experts did testify that an early operation would have been much simpler than the one plaintiff ultimately underwent.

"* * * * When the Trustee amended his pleadings, however, he did not amend them to conform to the proof, but set up an entirely new defense to the claim of the government. For the first time he pleaded the statute of limitations. That was not one of the issues in the original trial. Any evidence introduced at the time of the trial tending to bear on the statute of limitations was incidental to the question of notice and was not introduced for the purpose of this defense. An amendment after judgment stating a new cause of action or a new defense is not permissible under the guise of conforming the pleadings to the proof and the court was right in striking the amendments from the records and reinstating the original judgment****".

See also *United States v. City of Brookhaven*, 5 Cir., 134 F. 2d 442, 446; *Nordstrom v. McAllister Brothers, Inc.*, S.D.N.Y., 9 F.R. Service, 15b 1, Case 5. The proposed new claim, not having been an issue tried by express or implied consent of the parties, was not an amendment authorized by Rule 15(b).

The amendment sought is perhaps within the power of the court under subdivision (a) of Rule 15[1], but even if it were within the power of the court under either subdivision (a) or subdivision (b), this was not a case in which the power should have been exercised. Plaintiff's failure to move to amend in advance of trial was deliberate and not excusable. Plainitff's trial counsel had been retained nine months before trial. The case had been sent out for trial and settlement negotiations abandoned one week before the trial actually commenced. Even busy trial counsel

[1]It is said that this power may be exercised even after trial. 1 Barron and Holtzoff Federal Practice and Procedure 889, Section 446.

had had adequate opportunity to familiarize himself with the case and to make his final decision as to the theory on which he intended to proceed. None of the testimony at the trial was unanticipated.

Plaintiff's counsel claims that the amendment should be allowed because defendants' counsel was not surprised. Plaintiff's counsel had in fact badgered his opponent with the **possibility** of this amendment and with others which he never requested[4] but he had never given notice of an intent to amend. The discussion of possible amendments was merely an incident in a war of nerves designed to keep defendants and the court guessing as to what plaintiff's claim would ultimately prove to be. These are tactics a court should decline to aid or abet.

Plaintiff's motion for reargument of the denial of leave to amend is denied.

There remains the question of the amount to which plaintiff is entitled as maintenance and cure. It is my conclusion that he should receive $8.00 a day for a period from July 17, 1952 when he left the vessel, until January 5, 1953, except for the period from July 31, 1952 to September 24, 1952, when he was a patient in the Marine Hospital at Staten Island. After January 5, 1953 he was not entitled to maintenance and cure because he failed to return to the Marine Hospital for further treatment as directed.

[4]For example, during settlement conference plaintiff's counsel also threatened to amend the complaint to charge defendants with alleged inadequate treatment by the Marine Hospital as their agent. At the opening of the trial he disclaimed any such theory of liability.

This leaves, as a possible basis for future action, his claim based upon a corrective operation and recuperation therefrom if one is had.

It is so ordered.

Dated: December 31, '55

LAWRENCE E. WALSH,
United States District Judge.

[SAME TITLE]

JUDGMENT
(Record Pages 821-823)

The plaintiff, CONSTANTINE MACRIS, having commenced this action against the defendants, SOCIEDAD MARITIMA SAN NICOLAS S.A., and PETMAR AGENCIES INC., alleging a first cause of action for damages for personal injuries and a second cause of action for maintenance and cure arising out of his service as an officer on the Steamship "EURYVIADES", and the action having duly come on for trial before the Honorable Lawrence E. Walsh, United States District Judge, without a Jury, and the plaintiff having appeared by Jacob Rassner, Esq. and the defendants by Renato C. Giallorenzi, Esq., and having submitted their respective proofs and rested, and the plaintiff having moved to amend his complaint and to conform the pleadings to the proof and due deliberation having been had thereon, and the Court in its opinion made at the conclusion of trial on October 31, 1955, and filed herein on November 17, 1955, having denied plaintiff's motion to amend his complaint and having found that said Steamship "EURYVIADES" was owned by the defendant, SOCIEDAD MARITIMA SAN NICOLAS, S.A., and having further found for defendant and against plaintiff on his first cause of action for damages for personal injuries, and having found for plaintiff and against defendant SOCIEDAD MARITIMA SAN NICOLAS S.A. on his second cause of action for maintenance and cure, and the plaintiff having moved for a reargument of his motion to amend his complaint and to con-

form the pleadings to the proof and due deliberation having been had thereon, and the Court in its opinion made and filed herein on December 31, 1955, having denied plaintiff's motion for reargument of the denial of leave to amend his complaint and having found that plaintiff should receive maintenance and cure at the rate of $8.00 per day for a period from July 17, 1952, until January 5, 1953, except for the period from July 31, 1952, to September 24, 1952,

NOW, on motion of RENATO C. GIALLORENZI, attorney for defendants, it is

ORDERED AND ADJUDGED, that defendant, PETMAR AGENCIES, INC., have judgment dismissing the complaint of CONSTANTINE MACRIS against said defendant, PETMAR AGENCIES, INC. and it is further

ORDERED AND ADJUDGED that defendant, SOCIEDAD MARITIMA SAN NICOLAS S.A. have judgment dismissing the first course of action of the complaint of CONSTANTINE MACRIS against said defendant SOCIEDAD MARITIMA SAN NICOLAS, S.A. and it is further

ORDERED AND ADJUDGED that plaintiff, CONSTANTINE MACRIS have judgment against defendant, SOCIEDAD MARITIMA SAN NICOLAS S.A. for the sum of $928.00 on the second cause of action of the complaint.

Dated, New York, N. Y.
January 16th, 1956.

LAWRENCE E. WALSH,
U.S.D.J.

Judgment entered January 18, 1956.

WILLIAM V. CONNELL,
Clerk.

I hereby consent to the entry of the Judgment.

s JACOB RASSNER

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FILED
SEP 13 1957
JOHN T. FEY, Clerk

No. 469

United States Court of Appeals

FOR THE SECOND CIRCUIT

CONSTANTINE MACRIS,

Plaintiff-Appellant,

—against—

SOCIEDAD MARITIMA SAN NICOLAS, S. A., and PETMAR AGENCIES, INC.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT,
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLEES' APPENDIX

RENATO C. GIALLORENZI,
Attorney for Appellees,
No. 50 Broad Street,
New York City.

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PLAINTIFF'S WITNESSES

Panaghi D. Marchessini,
Examination Before Trial, Excerpts from:
Direct 10a

Dr. Karl F. Urbach:
Direct 15a
Cross 16a

Constantine Maeris:
Direct 18a
(Recalled)
Direct 20a
Cross 20a

Dr. George H. Hyslop:
Direct 25a
Cross 27a
Re-direct 30a

Dr. Jack Clarence Woodson Warnock:
Cross 36a

Defendants' Witnesses

PAGE

Dr. William L. Ferber:
Direct 13a

Dr. Allison H. Dugdale:
Direct 14a

Dr. George A. Keating:
Direct 32a
Cross 35a

Panaghi Dracatos:
Direct 39a

Plaintiff's Exhibits

4 Doctor's Report, Bremen, Germany (offset), marked in evidence 43a

5 Doctor's Report, Santos, Brazil (offsets), marked in evidence 45a

6 Marine Hospital Report, Baltimore, Md. (offsets), marked in evidence 47a

Defendants' Exhibits

D Letter of July 22, 1952, marked in evidence 48a

E Letter of July 30, 1952, marked in evidence 50a

H Detention Order, U. S. Dept. of Justice (offset), marked in evidence 51a

J Statement of April 14, 1952, marked in evidence.. 52a

K Request and Receipt for Payment, marked in evidence 54a

(670)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civ. Action #81-35

CONSTANTINE MACRIS,

Plaintiff,

—against—

SOCIEDAD MARITIMA SAN NICOLAS, S. A., and PETMAR AGENCIES, INC.,

Defendants.

Defendants, answering the complaint, by their attorney, Renato C. Giallorenzi, allege upon information and belief as follows:

FOR THEIR ANSWER TO THE FIRST CAUSE OF ACTION

1. Deny any knowledge or information thereof sufficient to form a belief as to each and every allegation contained in Paragraph "1" of the complaint.

2. Admit that the defendant, Sociedad Maritima San Nicolas S. A., is a corporation organized and existing under and by virtue of the laws of the Republic of Panama and except as herein admitted, deny the remaining allegations contained in Paragraph "2" of the complaint.

3. Admit that the defendant, Petmar Agencies, Inc., at all times mentioned in the complaint, maintained an office and place of business located at 17 Battery Place,

Borough of Manhattan, City and State of New York and acted as agent for the defendant, Sociedad Maritima San Nicolas, S. A., and except as herein admitted, deny the remaining allegations contained in Paragraph "3" of the complaint.

4. Admit that at all times mentioned in the complaint, defendant, Sociedad Maritima San Nicolas S. A., owned, operated, managed and controlled the SS "Euryviades", a merchant vessel (671) and except as herein admitted, deny the remaining allegations contained in Paragraph "4" of the complaint.

5. Admit that at all times mentioned in the complaint plaintiff was signed aboard the SS "Euryviades" as Second Mate by the defendant, Sociedad Maritima San Nicolas S. A., having signed articles therefor at the port of Baltimore on April 6, 1952 at the rate of wage of £70 per month and board and lodging and continued in said employ through July 4, 1952 and except as herein admitted, deny the remaining allegations contained in Paragraph "5" of the complaint.

6. Deny each and every allegation contained in Paragraphs "6", "7", "8", "9", "10", "11", "12" and "13" of the complaint.

AS A FIRST, COMPLETE DEFENSE TO THE FIRST CAUSE OF ACTION

7. That if plaintiff received any injuries as alleged in the complaint, said injuries were caused in whole or in part by plaintiff's negligence and were not caused or contributed to in any manner by any negligence of these defendants.

Answer

As a Second, Complete Defense to the First Cause of Action

8. That the injuries to the plaintiff, if any, arose out of certain risks, dangers and hazards, all of which were open, obvious and well known to the plaintiff at and before the said injury, and all of said risks, dangers and hazards had been assumed by the plaintiff.

As a Third Complete Defense to the First Cause of Action

9. That the SS "Euryviades" was at all times hereinafter mentioned in the complaint, a Liberian ship and registered under and subject to the laws of Liberia; that the plaintiff was a member of the crew of said Liberian ship and together with all (672) other members of the crew thereof, subject to the laws of Liberia.

10. That the issues involved herein accordingly are subject to and governed by the laws of the Republic of Liberia.

For Their Answer to the Second Cause of Action

11. Deny each and every allegation contained in Paragraph "14" of the complaint.

As a First Complete Defense to the Second Cause of Action

12. That if plaintiff became sick or disabled as alleged in the complaint, said sickness was caused in whole or in part by plaintiff's fault and was not caused or contributed to in any manner by the fault of these defendants.

Answer

As a Second Complete Defense to the Second Cause of Action

13. That plaintiff was paid by the owners of the SS "Euryviades" all of the monies due him while employed by the owners of said vessel, which monies were paid by the owners of said vessel and accepted by the above-named plaintiff in full payment of, and for the matters and things stated in the complaint.

As a Third Complete Defense to the Second Cause of Action

14. That the SS "Euryviades" was at all times hereinafter mentioned in the complaint, a Liberian ship and registered under and subject to the laws of Liberia; that the plaintiff was a member of the crew of said Liberian ship and together with all other members of the crew thereof, subject to the laws of Liberia.

15. That the issues involved herein accordingly are subject to and governed by the laws of the Republic of Liberia.

Wherefore, defendants demand judgment dismissing the plaintiff's complaint together with the costs and disbursements (673) of this action.

Renato C. Giallorenzi
Renato C. Giallorenzi
Attorney for Defendants,
Office & P. O. Address,
50 Broad Street,
New York, N. Y.

Order Dated June 10, 1955 Amending Answer

(711)

[SAME TITLE]

• • • •

FURTHER ANSWERING THE COMPLAINT AND FOR A FOURTH, SEPARATE AND COMPLETE DEFENSE TO THE CAUSES OF ACTION SET FORTH IN THE COMPLAINT, DEFENDANTS ALLEGE:

16. That heretofore and on or about the 14th day of April, 1952, plaintiff, for a (712) valuable consideration, duly executed and delivered to defendants a release in writing wherein and whereby he released defendants from any and all liability upon the claims of plaintiff alleged in plaintiff's complaint herein.

Testimony

(1)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civ. 81-35

CONSTANTINE MACRIS,

Plaintiff,

—against—

SOCIEDAD MARITIMA SAN NICOLAS, S. A. and PETMAR AGENCIES, INC.,

Defendants.

Before:

HON. LAWRENCE E. WALSH,
District Judge.

New York, October 25, 1955,
10.30 a. m.

APPEARANCES:

JACOB RASSNER, ESQ.,
Attorney for Plaintiff.

RENATO C. GIALLORENZI, ESQ.
Attorney for Defendants.

• • • •

(2)

Mr. Rassner: If the Court please, • • •

• • • •

Excerpts from Opening on Behalf of Plaintiff

(3) • • •

I ask Mr. Giallorenzi, in the interest of expediency, will you stipulate that these are the facts so I don't have to—so far—so I don't have to question the plaintiff on that?

Mr. Giallorenzi: I will, except for this fact, your Honor: I cannot stipulate anything prior to Baltimore, April 7, 1952, because the complaint——

Mr. Rassner: All right, I will continue.

• • • •

(4) • • •

In view of the fact that this ship was (5) flying an alien flag and was owned by an alien corporation, the facilities of the Public Health Service were not available to the seaman other than at the expense of the owner. So the owner provided private treatment by way of the Marine Hospital, but in this instance it constituted private treatment for which I understand the defendant paid.

• • • •

(7) • • •

The cause of action upon which we are suing at the present time is one involving a voyage which commenced in Baltimore, I think it was April 1952. Commenced in Baltimore April 7, 1952. That is the voyage on which we claim liability is imposed.

We contemplate making a motion, • • •

However, we will come to that at a later time. I am not making a motion at the present time.

• • • •

[Dr. Jesse Hymes—for Plaintiff—Direct]

(20) • • •

The Court: What does the complaint allege?

Mr. Rassner: We are not——

Excerpts from Opening on Behalf of Defendants

The Witness: We are not saying malpractice.

Mr. Rassner: That is a trial question. The argument advanced in the objection to my question is unfounded. No. 1, we don't claim malpractice. • • •

• • • •

(29) • • •

Mr. Rassner also stated that he would sooner or later, I don't know when, make a motion to the Court to add another cause of action. I presume that he is going to add a cause of action which deals somewhat with the accident in Bremen. Well, if that motion is made, I would now like to voice my objection to the making of such a motion, not only on the eve of trial, but even after trial has commenced, and I would like to submit in that regard and in opposition to such motion as Mr. Rassner will make an affidavit and a memorandum of law.

The Court: Well, why do you do that before there is any motion made?

(30)

Mr. Giallorenzi: Well, I don't know what he is going to do. I mean, as he indicates, he is going to make his motions as they come along, just the way he said, he indicates. I don't know whether I am under the Jones Act or the General Maritime Law. I am here to defend the case, your Honor, and I have got to know what I have to defend.

The Court: All right.

Mr. Giallorenzi: Now, I strenuously oppose any motions to amend the complaint which will add additional causes of action or new causes of action for the reasons set forth in my affidavit.

The Court: All right.

Mr. Rassner: By that statement he waives notice; he can't plead surprise.

Colloquy of Counsel

Mr. Giallorenzi: Well, I mean, you said it yesterday that you were going to do it. You said yesterday —

Mr. Rassner: Premature. I may change my mind. I have not made any.

Mr. Giallorenzi: After all, I can't run back to my office and dictate an affidavit or memorandum of law when you have an advantage over me if you are going to call these motions as you see fit. (31) I have got to be prepared for them, your Honor, and I don't think it is right that at this late date, Mr. Rassner has been in this case since January, that he should go ahead and try to ring in a new cause of action.

• • • •

(33) • • •

I would also like to stress one other thing, your Honor, that the complaint alleges that we resigned this man on April 7th and that everything that happened to him was from that day on, April 7, 1952.

Therefore, I again say, looking at the pleading, which is very important, that any information which they seek to bring in before that day is foreign to the issues in this case and not germane because their cause of action is bottomed on events that happened after April 7, 1952.

There is also one other point which I would like to make in this opening and that is, there was some testimony, some reference, rather, has been made in the opening that the Marine Hospital at (34) Staten Island, at which Mr. Macris was operated on, was the agent of the owner. That is not so. The Marine Hospital is not the agent of the owner and again, if anything occurred to him there, it occurred—which we do not concede—it happened while he was in an institution of his own choosing, not one that we selected. But he wanted to go there and the consequences, if any, are his responsibility. • • •

• • • •

(42) • • •

"Panaghi D. Marchessini, on behalf of defendant, having been first duly sworn by a notary public of the State of New York, testified as follows:

"Direct examination by Mr. Goldstein:

• • • •

(44) • • •

"Then, Compania de Navegacion San Salvador S. A., a Panamanian corporation, organized in Panama; started business early in 1941, and I am President.

"Then Sociedad Maritima San Nicolas S. A., a corporation organized in Panama; started business in May 1946. I am President.

• • • •

(49) • • •

"Q. The Compania de Navegacion San Salvador S. A., who owns the stock of that corporation? A. The stock of the Compania de Navegacion (50) San Salvadore is owned 40 per cent by myself, P. D. Marchessini; 20 per cent by my wife, Helen Marchessini——

"Q. You own 40, you say? A. (Witness nods). (Continuing) 20 per cent by my son, Demetri Marchessini, and 20 per cent by my son, Alexander Marchessini.

• • • •

(51) • • •

"Q. Who owns the stock for Sociedad San Nicolas? A. San Nicolas is a subsidiary of San Salvador, and all the stock of San Nicolas is owned by San Salvador.

• • • •

(56) • • •

"Q. When you say that Petmar acts as an agent, what are its duties as an agent? A. The duties as an agent is to find employment for the ships in the United States,

Excerpts from Examination Before Trial of Panaghi D. Marchessini—for Plaintiff—Direct

collect freights, pay disbursements, and generally do the services expected from an agent in a foreign country.

• • • •

(103) • • •

"Q. You also testified that you became a citizen of the United States on or about July 12, 1955? A. Exactly.

"Q. And that your wife became a citizen on August 4th, 1953? A. Yes, sir.

"Q. Your son, Demetri, on July 14th, 1953; your son, Alexander, on August 10th, 1954? A. Yes, sir.

"Q. Prior to that time, were you, your wife and two children citizens of Greece? A. That's right.

• • • •

(104) • • •

"Q. You have testified to familiarity with the activities of Petmar Agencies, Inc. When Petmar Agencies, Inc. acted for a vessel, whether for Sociedad Maritima San Nicolas S. A. or any other, when freights were collected or disbursements made, or any other acts done with respect to those vessels, where those acts done as agents for the account of the owner of the vessel? A. Yes, sir.

• • • •

(126) • • •

[Dr. Jesse W. Hymes—for Plaintiff—Recalled—Direct]

Mr. Rassner: —the photostatic copies of the hospital record at Bremen.

Mr. Giallorenzi: I object to that, your Honor, because the pleadings very clearly indicate that the cause of action which is being tried is based on a contract of employment in April of 1952, at Baltimore, and these medical records deal—this medical record at Bremen deals with an examination of the

plaintiff in that particular city on January 17, 1952.

The Court: I will take it. Overruled.

Mr. Giallorenzi: I respectfully except.

(Plaintiff's Exhibit 4 received in evidence.)

Mr. Rassner: At this time I offer in evidence photostatic copies of the records of treatment at Santos.

Mr. Giallorenzi: My objection is based on the same ground as the prior one, that this was an examination conducted before April 7, 1952.

The Court: I will take it.

(Plaintiff's Exhibit 5 received in evidence.)

The Court: Wait a minute. What is Exhibit 5?

Mr. Rassner: The treatment at Santos.

(127)

The Court: All right.

Mr. Giallorenzi: And I object to it on the ground that it also involves——

The Court: Earlier period.

Mr. Giallorenzi: That's right.

The Court: All right, I will overrule that objection.

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(137) • • •

Mr. Giallorenzi: I have to object continuously, your Honor, but I have to maintain my position that Mr. Rassner is limited to April 7th forward, and again I renew the objection on that ground. Rather than waste the Court's time, may I have a continuing objection to any question which may relate to a day prior to April 7, 1952?

Motion to Strike Certain Testimony of Witness Hymes—Denied

The Court: Yes.

• • • •

(159) • • •

Mr. Giallorenzi: I now move to strike out (160) those portions of Dr. Hymes' testimony which deal with the statements made that the plaintiff's condition was the result of an overdose of prolonged anesthesia, on the ground that the doctor has testified that he has had no experience as an anesthetist and that he has no independent knowledge of his own as to the use of metycaine or any other drug.

• • • •

Mr. Rassner: If there was any indication that we predicate a cause of action on an overdose of anesthesia, I hereby withdraw any such claim. We say we are not making any claim based on an overdose. We say that the treatment was proper, the amount, under the circumstances, was proper.

The Court: I will deny your motion at this time, without prejudice to renewing it at the close of the plaintiff's case.

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(263) • • •

William L. Ferber, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination by Mr. Giallorenzi:

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(285) • • •

Q. Could you have any lesions to the spinal cord if a spinal anesthesia of metycaine was injected between the

third and fourth vertebrae and the fourth and fifth vertebrae?

Mr. Rassner: If the Court pleases, we have no such claim in the case.

The Court: I will take it.

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(294) • • •

ALLISON H. DUGDALE, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination by Mr. Giallorenzi:

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Q. Dr. Dugdale, did you examine the plaintiff, Constantine Macris? A. Yes, I did.

(295)

Q. Could you tell us when you examined him? A. I think I first saw him about the middle——

Mr. Rassner: We have all the reports.

Mr. Giallorenzi: Wait a minute. Let him testify. This will cut him short.

A. I examined him, I think, the 15th of July, 1952.

Q. And that was before he was operated on? A. Yes.

Q. Could you tell us what you ascertained his condition to be? A. He had a small right and left inguinal hernia.

Q. Could you determine at that time whether Mr. Macris could travel? A. Oh, yes, he could travel.

Q. And could he have made a trip to Greece in safety? A. Oh, yes.

Q. Did you consider that Mr. Macris' condition was such at that time that he needed an immediate operation? A. Oh, no.

• • • •

(297) • • •

KARL F. URBACH, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct examination by Mr. Rassner:

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(302) • • •

Q. Does the administration of anesthesia entail certain incidental risks? A. Any anesthetic entails risks.

• • • •

(303) • • •

Q. Now, doctor, in administering the anesthetic, was there any incident that you want to call our attention to? A. There was no incident at the time, either of these anesthetics was administered, as far as the records show.

Q. You do know that on occasion there is a surgical accident in administering anesthetics? A. An anesthetic accident.

• • • •

Q. Was there any anesthetic or surgical accident involved in this case? A. No.

• • • •

(306) • • •

Q. Was there any contact between the needle and any nerve or nerve fiber? A. There was no contact that we could tell.

Q. Well, is it your opinion with a reasonable degree of medical certainty that there was no contact?

• • • •

A. That is my opinion.

Q. Upon what facts do you base your opinion? A. When a spinal needle, on entering the spinal canal, makes contact with a nerve, there is usually a sensation the-

patient experiences. If it is a motor nerve there is a jerking of a limb; if it is a sensory nerve there is usually a sensation of (307) electric shock, and the patient will tell and can tell whether—there is no other way of telling whether——

Q. And if such contact is made, is it the practice of your hopsital and you in particular to make an entry of that in the record? A. Yes.

Q. Was there any such record made by the doctor who did the second administration of anesthetic? A. No.

Q. From that record can you state with a reasonable degree of medical certainty whether there was any nerve and needle contact on the second administration of anesthesia? A. I can.

Q. And what is your opinion? A. No.

• • • •

(316) • • •

Cross examination by Mr. Giallorenzi:

• • •

Q. I mean after the secon operation. A. After the second? I have stated before that this is a complication which we see in approximately 3 per cent of persons who have low abdominal operations and receive spinal thesia for it. It is an excepted risk.

Q. It is not usual, in other words? A. It is; three out of a hundred patients will get it.

• • • •

(317) • • •

Q. I notice that when you administered the anesthesia on the first operation, that there were 100 milligrams of metycaine used. A. Metycaine, that is correct.

Q. And that is a standard drug? A. It is a standard drug.

Q. It is used, accepted; is that right? A. Its use is accepted.

• • • •

(318) • • •

Q. Then in other words, you testimony is that the materials which were used on the two occasions were exactly the same? A. Right.

Q. And did you consider the two materials which were used—and I am now talking about the metycaine and the glucose used to weigh the metycaine down—normal? A. Yes.

Q. Amounts? A. Yes.

• • • •

(319)

Q. Now, if there was anything unusual that occurred during the administration of the spinal, that would be noted on the report? A. That is correct.

• • • •

Q. And we have no such entries in these two reports of the two operations? A. That is correct.

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(325) • • •

Q. Now, I refer to Plaintiff's Exhibit 1, the anesthetist's report for the second operation, and ask you to state whether in your opinion the anesthesia was administered with proper technique.

Mr. Rassner: I object to this. There is no claim that it wasn't. Again we are having a straw man put up.

The Court: I will overrule the objection. Go ahead.

The Court: Do you want the question read back?

The Witness: I know the question now.

A. It is impossible to state whether the technique is proper without being present and watching a spinal anesthetic administered. As far as appears from the record, and knowing the man who administered that spinal anesthetic, it probably was administered (326) with good technique.

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(332) • • •

Q. In other words, the first operation consumed about an hour and the second one likewise? A. Approximately, yes, sir.

Q. Would you say that the anesthesia which you administered and which Dr. Carter administered would be considered a prolonged anesthesia? A. No.

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(335)

CONSTANSTINE MACRIS, the plaintiff, having been first duly sworn, testified as follows:

Direct examination by Mr. Rassner:

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(338) • • •

Q. Now, you signed on, on the Euryviades on November 10, 1951. A. That's right.

Q. Where was that, what city? A. Piraeus, in Greece.

• • • •

(341) • • •

Q. Now, when the vessel arrived at Bremen, Germany, on January 8, 1952, in what capacity were you sailing? What was your job? A. Second mate.

Constantine Macris—Plaintiff—Direct

Q. Was it your intention to have the vessel ride at anchor or tie to at the pier?

Mr. Giallorenzi: Now, I press my objection, your Honor, on the ground that Mr. Rassner is now seeking to bring in testimony which involves a period of time without the pleadings. The pleadings specifically allege a cause of action against these defendants based on a hiring of the plaintiff on (342) April 7, 1952, at the Port of Baltimore.

The Court: I think he can show the course of dealing between the parties before the hiring. I will take it. Don't lead, Mr. Rassner.

Mr. Giallorenzi: I respectfully except.

Mr. Rassner: That is what I said. I specifically stated that unless counsel objected I was going to lead from certain points and then stop from there.

Mr. Giallorenzi: I will have to object to this.

The Court: All right.

Mr. Rassner: I don't intend to lead from that. I just wanted to skip over these questions, on which there was no dispute.

Mr. Giallorenzi: Just before we go any further, if you are going to have a line of questions on anything dealing prior to April 7, 1952, I would like to note now for the sake of saving time a continuous objection to all of those questions.

The Court: All right, your objection is noted, but I am going to let him prove the history of the dealing of the parties up to Baltimore.

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(415) • • •

CONSTANTINE MACRIS, resumed.

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Direct examination (continued) by Mr. Rassner:

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(417) • • •

Q. Did you stay on the ship? A. I stay.

Q. Where did the ship go from Baltimore? A. From Baltimore to Korea.

Q. To Korea? A. Yes.

Q. And did you get any treatment on the ship? A. No.

Q. How did you feel? A. Always worse.

Q. Always what? A. Worse.

Q. It always hurt? A. Yes.

Q. Was it the same hurt? A. No, always more pain.

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(508)

CONSTANTINE MACRIS, resumed.

Cross examination (continued) by Mr. Giallorenzi:

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(525) • • •

Q. Do you mean to tell me your testimony is that you picked the second line up just to put, place it on a bollard on the deck of the vessel? A. Yes.

Q. In other words, you were picking the line up and putting it on a bollard? A. Yes.

Q. That is when you felt this pain? A. Yes.

Q. Have you ever picked a similar line up before? A. Only on that ship.

Q. And you pick that line up, you say, with several other men? A. Yes.

Q. In the act of picking the line up to place it on this bollard, you felt a pain? A. Yes.

Q. Were there any other lines placed ashore? A. Before or after?

Q. No, after. A. Yes.

Q. Were they the third— A. Yes.

Q. And how did you place the third line to shore? (526) A. Between that time, I stayed a little down because I felt pain and after a few minutes I got up again, and from the bridge told me again to give the third line.

Q. I assume you threw that out, is that right, to the dock? You threw the third line out? A. Yes.

Q. What else did you do after that? A. We put the third, fourth, fifth—I don't remember how many lines we put all together, but we put more than three or four lines out; I mean, ropes, and we fixed it little by little on the ship.

Q. After you picked up that second line and put it on the bollard on the deck, did you handle any other lines? A. After?

Q. Yes, during this operation. Did you handle any other lines? A. After the second?

Q. Yes. A. No.

Q. Before the vessel left did you see a doctor in Germany? A. Yes.

Q. Who sent you there? A. The captain.

Q. What did the doctor tell you, if you recall? (527) A. The doctor said, "You have a hernia, both sides, and immediately go to the second port and you must see the doctor to the other port."

• • • •

Constantine Macris—Plaintiff—Recalled—Cross

(535) • • •

Q. Did you subsequently sign off the Euryviades at Baltimore? A. Excuse me?

Q. Did you sign off the ship? A. Yes.

Q. At Baltimore? A. Yes.

Q. Referring to Plaintiff's Exhibit C for identification, is this your signature here? A. This one.

Q. And the date which you signed off was April 6, 1952, is that right? A. Must be.

Q. And the observation was "Signed off on account of illness," is that correct? A. Yes.

Q. Did you go ashore with your belongings, your uniforms, your sextant? A. Uniforms?

Q. Yes, when you signed off the vessel did you take your baggage with you? A. In——

(536)

Q. In Baltimore. A. Let me explain you.

Q. You tell me what you did after you signed off in Baltimore. A. I wait to go to the Marine Hospital.

Q. Yes. A. And then came the wagon and took me to Marine Hospital, and I took my clothes, my luggage, and I go in the hospital and because the—the guardsman took me back with all my clothes again to the ship.

Q. Were you examined by a doctor in the Marine Hospital? A. Yes.

• • • •

(537) • • •

Q. After you came back from the Marine Hospital in Baltimore, what happened then, Mr. Macris? A. I requested Captain—to Captain to send me back in Greece.

Q. And? A. And he refused at first, but after, I don't know how long, he called me and told me (538) "you can go with the ship 'Nea Hellas'. • • •"

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(539) • • •

Q. Do you know what type vessel the "Nea Hellas" is? A. Passenger ship.

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(543) • • •

Q. You then were told by Captain Panaghi Dracatos that he had arrangements to return you to Greece; is that correct? (544) A. Yes.

Q. Then you resigned on the vessel for the trip to Korea? A. Yes.

Q. As second mate also? A. Yes, sir.

Q. At 70 pounds a month? A. Yes.

Q. You knew when you resigned that the vessel was going to Korea, is that correct? At Baltimore, when you signed on again? A. Yes.

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(545) • • •

Q. After you arrived at Masan, Korea—is that (546) the port you went to? A. Yes.

Q. Did you see a doctor there? A. Yes, sir.

Q. You were examined by him? A. Yes, sir.

Q. Was Captain Panaghi Dracatos with you at the time of the examination? A. Yes.

• • • •

(548) • • •

Q. When the vessel left Masan, where did it then proceed to? A. We stopped in Japan for a few hours in—port (549) in Japan for bunkers.

Q. Then you came to San Francisco? A. To Richmond.

Q. Were you examined——

Mr. Rassner: I was wondering this is off the record.

(Discussion off the record)

Constantine Macris—Plaintiff—Recalled—Cross

Q. Where did you arrive at? What was the first port on the West Coast, Mr. Macris? A. In Richmond, California.

Q. Were you examined by a physician there? A. Yes.

Q. Did you ask to be operated on in Richmond? A. No.

Q. You did not? A. No.

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(550) • • •

Q. When you arrived in New York from the West Coast you testified that you went to the offices of Petmar Agencies. A. Yes.

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(552) • • •

Q. Isn't it a fact that you told them that you wanted to remain here in the United States to be operated on because the hospitals were better equipped here? A. Yes.

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(561) • • •

Q. When you were in Greece you arrived in Greece in August 1953? A. Yes.

Q. Did any doctor examine you? A. No.

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(365) • • •

GEORGE H. HYSLOP, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct examination by Mr. Rassner:

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(370) • • •

Q. Now, would the fact that there was a delayed treatment of some seven months between onset of the hernia and the time of the operation be a competent producing cause of aggravating the condition?

Mr. Giallorenzi: I object to that, your Honor. The witness has no knowledge of the condition of the plaintiff prior to operation.

Mr. Rassner: I take that hypothetically from the evidence in the case, that he had a hernia, (371) and that is in the hospital records and the dates of treatment are there.

Mr. Giallorenzi: None of which have been shown to the witness.

The Court: I will let the witness answer within the field in which he feels qualified to express an opinion.

Mr. Rassner: Thank you, sir.

Mr. Giallorenzi: I respectfully except.

Q. Would you give us the benefit of your opinion, doctor? A. Well, the question I don't know whether you are referring to whether there are facts in the record which would enable a specific answer, or whether you are referring to a hypothetical general situation.

Q. Well, you are acquainted with the hospital record and past history in this case. Suppose you take that into account. A. Well, I have seen that left with me yesterday.

the hospital records and the findings of, I think, two physicians who had seen the man prior to operation. I couldn't say from those findings whether there was any measurable progress in either of the two hernias. He had had considerably more pain as time went by (372) incidental to certain muscular effort, and whether the size of the sac or thing of that sort had altered, I am not in a position to say.

Q. Well, then, I better give you the records themselves. A. The operative findings don't enable a definite answer to that either.

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(374) • • •

Q. Doctor, assume that this man's condition was such as is described in these various records, which I now will specifically call to your attention:

That his condition on the 17th day of January, 1952, was as described in Plaintiff's Exhibit 4; that on or about the 7th day of April, some two or three months later, his condition was as described in Plaintiff's Exhibit 2; assume that he continued to do work of a manual nature, such as is usually performed by an able-bodied seaman, including the painting and handling ship's gear and chipping of paint; assume that his condition by the time he entered the hospital was as described in Plaintiff's Exhibit 1;

Can you say with a reasonable degree of medical certainty whether the delayed treatment was (375) an aggravating cause in this man's condition?

Mr. Giallorenzi: My objection to that is only one, and that is, the amount of work which the plaintiff did during that period, manual work which Mr. Rassner was referring to.

Mr. Rassner: If the doctor can't state, we will add further, but I am asking the doctor if he can give an opinion on those facts as related.

A. In answer to your question, it depends upon two things; one, whether examination findings on either of these three dates, January '52, April '52 and on admission to the hospital, enable one to judge whether there had been any change in the hernia found. What is recorded does not enable an opinion on that.

• • • •

(376) • • •

Q. Doctor, what is your opinion? Is it or isn't it? I would like to have your opinion. A. I don't know. There aren't enough facts there. There is one thing which is suggestive, namely, the man's story of increasing trouble.

• • • •

(384) • • •

Cross examination by Mr. Giallorenzi:

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(393) • • •

Q. Did the plaintiff tell you when you saw him that he was impotent, but that he could have an incomplete erection and reduced sensation and ejaculation? A. That is what he told me.

Q. Did you make any specific test in regard to that? A. I couldn't.

Q. You couldn't? A. No.

• • • •

(397) • • •

Q. Did you come to the conclusion that the anesthetic which was used in these operations was the culprit and responsible for Mr. Macris's condition? A. Whatever anesthetic was used—it happened to be the same one in the second operation—responsive tissue to that anesthesia was at fault. (398) It was unpredictable and you couldn't prevent it.

• • • •

(399)

The Witness: One in 400 spinal anesthesias produce some complication directly involving, from the organic standpoint, one part or another of the nervous system. Transient or persistent, partially or totally disabling, and disturbance of bladder function is one of the common ones and I have seen several where there was a persisting impairment of bladder function.

Q. But you can't tell beforehand? A. You can't predict it; you can't prevent it.

Q. It is just one of the hazards of an operation? A. That is correct. It is one of the hazards of spinal anesthesia, these particular complications.

Q. Well, don't you have complications with other types of anesthesia, when other types of anesthesia are used? A. You have different complications.

Q. Different complications? A. Yes.

Q. So whether you use one type of anesthesia or another one, you do run a hazard of some type of complications? A. That is correct.

Q. Now, doctor, could you tell me the dose of metycaine which was used in each operation? (400) A. There was 100 milligrans. I remember reading that.

Q. And that was the same? A. It is the same dose used.

Q. Can you account for the reason why when you used the same dose of anesthesia in each operation there should be these complications? A. No.

Q. You have no reason to doubt that this anesthesia was properly administered? A. I have said no reason to doubt.

Q. You didn't see Mr. Macris until after his operation; isn't that correct? A. It was about 16 months; no, 26 months.

Q. And you made no tests involving the urological field; is that correct? A. No.

Q. And you don't know the extent and size of his hernia at the time he was operated on? A. There is nothing in the record except the operation record which describes —I think the hernia sac on the left was a little bit more advanced than the one on the right. I might be wrong. I didn't give it particular notation, but there was nothing in the record submitted to me that would enable you to say whether there is any appreciable difference (401) in the size and condition of these hernias between the first physical examination and the operation. I have already said that.

Q. So that you are not sure that the period, intervening period of time, between when Mr. Macris suffered the hernia and the date of his operation, whether there had been any appreciable enlargement of his hernia?.

Mr. Rassner: I object to the form of the question, doesn't have to be sure, and the question is improper.

The Court: Read the question back, please.

(Question read)

The Court: Overruled.

A. There is no fact to justify an opinion yes or no, no facts on record that I have seen.

Q. Would gonorrhea cause impotency, doctor? A. Yes.

Q. Could a condition of a chronic prostatitis cause impotency? A. It can.

• • • •

Dr. George H. Hyslop—for Plaintiff—By the Court

(402) • • •

By the Court:

Q. • • •

• • • •

A. • • •

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(403) • • •

• • • I felt that there was no pre-operative background which would predispose him to such a complication of the operation, whether it is spinal anesthesia or anything else that may have caused the complications.

• • • •

(411) • • •

By the Court:

Q. In other words, even a perfectly performed spinal anesthesia can produce a residual effect of the type here? A. This is one of the things which happens from a technically perfect spinal anesthesia.

The Court: All right.

Re-direct examination by Mr. Rassner:

Q. And, doctor, is it a fact that the greater amount of surgery required, the more anesthesia you must use? A. They limit spinal anesthesia use.

Q. But I am talking, the longer the operation is required to take, the more extensive work that has to be done, the greater the length? A. That is not true with spinal anesthesia.

Q. What is the situation there? A. There is one amount

given, one dose given. (412) Its effect is sufficiently long, lasts several hours before there is a return of sensory function.

• • • •

Q. I am trying to get the facts here as best I can and any help would be appreciated. Would the fact that the amount of surgery required is greater in one instance than in another have any bearing on the sequelae? A. No.

Mr. Giallorenzi: I object to it.

A. (Continuing) It has no bearing. I say we don't know what produces these complications of spinal anesthesia.

It isn't the tissue operated upon; it isn't the cause of the operation; it isn't the length of the operation. It is some other factor.

• • • •

(413) • • •

Mr. Giallorenzi: What infection?

Q. I understand there was some infection here. A. There was no infection related to the spinal anesthesia complications.

• • • •

Q. One more question. Does the resistance of the body have anything to do with the tolerance to the toxic effect of the anesthesia? A. Not that we know of.

Q. In other words— A. We have no measure of what it is responsible for, the appearance of the non-mechanical complications of spinal anesthesia, age, sex, weight, background of allergy, what have you. We have no evidence that justifies one in coming (414) to any conclusion that there are certain probable predisposing conditions.

Q. Now, one final question. If you can answer it, I would appreciate it. If not, just say you can't answer it. What determines, if you can tell us, the need of two operations rather than one for a double hernia?

Mr. Giallorenzi: I object to that, your Honor, on the ground that Dr. Hyslop was not present at the time they diagnosed the plaintiff's condition and whether it needed one or two operations.

Mr. Rassner: Well, there is no question he needed two.

The Court: Let's not get into an argument. I will take the doctor's answer, qualified as he feels necessary.

A. I wouldn't answer that question in this case.

The Court: All right, that is the answer, as far as I am concerned.

• • • •

(464)

GEORGE A. KEATING, called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

Direct examination by Mr. Giallorenzi:

• • • •

(466) • • •

Q. Have you ever administered any spinal anesthesia? A. Yes, sir.

Mr. Rassner: I don't question the doctor's qualifications.

Q. Did you ever use the drug known as methycaine? A. Yes.

Q. Is it an approved method? Is it an approved drug in so far as administering

Mr. Rassner: We are not claiming any mal practice here.

Mr. Giallorenzi: Wait a minute, please.

Q. Is it an approved drug in so far as the administration of anesthesia? A. Yes.

Q. Dr. Keating, I show you Plaintiff's Exhibit 1 and, in particular, the report of anesthetists on the two separate occasions, and ask you to tell us the dose of methycaine which was used in each operation? A. It says —

Mr. Rassner: If the Court please, may I object to this? There is no issue on this question. (467) I don't see why you are taking up the time of the Court and of the parties on something on which there is no issue.

The Court: Let us go ahead.

Mr. Giallorenzi: There was a very definite statement which rings out in my mind, by Mr. Rassner that there was a prolonged anesthesia.

Mr. Rassner: I withdraw my contention that there is any prolonged anesthesia. Our contention is not that the anesthetic, per se, caused any damage. It was the idea that he had to go through two operations instead of one by reason of defendants' breach of duty, that is all. If there is any doubt about it, I will concede now on the record that the amount of anesthetic administered on either and both cases was proper and adequate; that everything done in the case by the doctors was proper and adequate under the circumstances. I see no point in belaboring an issue which doesn't exist in the case.

The Court: I don't want to preclude Mr. Giallorenzi, if he wants to go ahead.

Mr. Giallorenzi: I think the point hasn't only been used by you but one of your own doctors (468) says 60 centimeters, I believe, of methycaine —

Mr. Rassner: May I stipulate to withdraw the charge, if there is such a charge?

Mr. Giallorenzi: Wait a minute. You cannot be changing your theories of the case in the middle of it. I have to meet certain proof which you raised and now you are trying to cut my defense, and I object to it, if your Honor pleases.

Mr. Rassner: If the Court please, I object to this evidence on the grounds that it is incompetent, irrelevant and immaterial. There is no issue on this question before the Court.

The Court: We will go ahead. I won't require counsel to limit his proof by your offered concession, if he doesn't want to take it. I will let him go ahead.

• • • •

(469)

Q. Are you familiar with the dose of anesthesia which you administered? A. Yes.

Q. Would you say 100 milligrams is a large amount? A. No, it is not.

Q. Is that the usual amount? A. Approximately, yes.

• • • •

Q. Doctor, again referring to these two reports of the anesthetists, could you tell us how long the operations took?

Mr. Rassner: I don't think there is any dispute. I don't understand why we are bringing out evidence as to matters on which there is no dispute. I object to it on the ground that there is no issue before the Court on these questions.

The Court: I will take it. Overruled.

A. The duration of the first one was approximately an hour, and the second one seems to be about (470) an hour, too.

Q. Would you say that they were unusual would you say that that was an unusually long period of time for a hernia operation?

Mr. Rassner: I object to that as entirely immaterial.

The Court: I will take it. Go ahead.

A. No, not so long.

* * * *

(472) * * *

Cross examination by Mr. Rassner:

Q. I would like to ask you a question. Have you seen those hospital records? Have you looked through them? A. Yes.

Q. Have you seen any evidence of malpractice?

Mr. Giallorenzi: I object to that, your Honor.

The Court: That is a pretty sweeping question.

Q. Did you see anything in the record which would indicate that the operation, or the anesthetic or the drugs, or the method of procedure was anything (473) but the average, normal procedure under this type of condition?

Mr. Giallorenzi: I object to the question because the doctor has limited his testimony to the anesthetists' report.

The Court: He may qualify his answer.

A. I looked at the report only from the viewpoint of anesthesia. I saw nothing to indicate malpractice.

* * * * *

Dr. George A. Keating for Defendants—Cross

(476)

Q. How about successive doses? Is there any correlation between neurological sequelae a. l successive average doses? A. There is none that I know of.

• • • •

(486)

JACK CLARENCE WOODSON WARNOCK, called as a witness in behalf of the plaintiff, being first duly sworn, testified as follows:

• • • •

(496) • • •

Cross examination by Mr. Giallorenzi:

Q. Doctor, how long does it take to perform an operation on hernia of this type? A. Well, that is not a question that can be answered very specifically, counselor. I would say it varies for from half an hour to a couple of hours.

(497)

Q. So does an operation of one hour each for hernia of this type is not unduly long, is it?

Mr. Rassner: Again we are getting into a field in which there is no issue. I object to it on the ground that it is incompetent, irrelevant and immaterial.

The Court: I will let him answer, if he can. If he cannot, he may qualify it.

Mr. Rassner: I will concede it is not unusual.

The Court: Mr. Giallorenzi wants the witness to answer.

The Witness: Pardon me. May I have the question?

(Question read.)

Dr. Jack Clarence Woodson Warnock—for Plaintiff—Cross

A. I would say not.

• • • •

(501) • • •

Q. Mr. Macris wasn't suffering from a strangulated hernia, was he? A. No, sir.

Q. At the time you operated on him. So no emergency existed for the operation, is that correct? A. I would say probably not.

(502)

Q. The second operation, the findings were a small indirect hernia, isn't that correct? A. Would you like me to refer to the record?

Q. Yes. A. Findings are, small indirect hernia with no direct components.

Q. That was not a strangulated one either, was it, Doctor? A. No.

• • • •

(507) • • •

By the Court:

Q. Doctor, I want to ask you:

Can you tell me the factors that entered into your decision to have two operations rather than one, if you recall now? And if you don't, why, just say so, or just qualify your answer?

The Witness: Your Honor, I don't recall.

• • • •

(568) • • •

PANAGHI DRACATOS, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination by Mr. Giallorenzi:

Mr. Rassner: Before the Captain takes the stand, I would like to make a motion on the record. I would like to move, your Honor, to amend the pleadings to conform to the proof.

The Court: You move the pleadings to conform to the proof? How will that change your allegations?

Mr. Rassner: I don't think it changes it but there may be some technical question that may arise. I believe that the type of motion that I am making at the present time——

The Court: In the absence of your pointing out to me any substantial need for granting the motion, I am going to deny it.

In other words, we will go along with the pleadings as they were proved.

Mr. Rassner: I ask your Honor to reconsider (569) the denial and ask your Honor to reserve decision.

If, on——

The Court: All right.

Mr. Rassner: —a study of the record, we deem in the interest of substantial justice an amendment of the pleadings is desirable or necessary, I would like to reserve that right to apply to the Court for that amendment. Frankly, I don't see any actual need at the moment.

The Court: I don't see that anyone has been surprised here through the trial, and I don't see any basis for amending the pleadings. As your

proof has gone along, it has seemed to be on the theory of the pleadings. I will hold it until the end of the defendants' case.

Mr. Rassner: I, frankly, don't know.

The Court: I will deny it at this time without any prejudice to you to renew it upon some subsequent date.

Mr. Rassner: Thank you.

Mr. Giallorenzi: Has the plaintiff rested?

Mr. Rassner: Plaintiff rests.

The Court: The plaintiff rests.

Mr. Giallorenzi: I suppose, ordinarily, at (570) this point the defense lawyer should make a motion to dismiss the complaint, but in view of the fact that there are several motions pending before you, one of which is a transfer to admiralty and, as I remember, such motions are not to be made in admiralty, otherwise you preclude yourself on the defense, I don't know just what to do .

The Court: It seems to me so much of the defense is in that you may make your motion on the present complaint and I will reserve decision and I will hear the rest of your case.

Mr. Giallorenzi: I so make that motion, your Honor.

The Court: Thank you.

By Mr. Giallorenzi:

Q. Captain Dracatos, by whom are you now employed? A. By nobody.

Q. Did you at one time have an interest in the Steamship "Euryviades"? A. Yes, sir, my brother and I.

Panaghi Dracatos—for Defendants—Direct

Q. What was the percentage of your interest in that vessel? A. 18 per cent amongst my brother and I.

(571)

Q. And you still have an interest in the vessel? A. No. I sold my interest.

Q. When did you sell your interest in the vessel? A. On August 1st.

Q. Of what year? A. This year.

• • • •

(607) • • •

The Court: [redacted] sides rest?

Mr. Rassner: Yes.

Mr. Giallorenzi: Yes.

• • • •

Mr. Giallorenzi: • • •

(608) • • •

I also would like to oppose strenuously any motions which Mr. Rassner may make to amend his pleadings to the proof, in view of the fact that certain elements did arise outside the scope of the pleadings.

• • • •

(648) • • •

The Court: The doctor in New York said he was fit for duty.

Mr. Rassner: At the time he was at the Marine Hospital, certainly, he was not suffering from a condition which required immediate surgery, and certainly not the surgery so extensive as to have it done in two parts.

The Court: I was well aware of this.

• • • •

Argument by Plaintiff after Decision

(650) • • •

Mr. Rassner: I feel Dr. Hyslop has made our case. Dr. Hyslop said the second operation was the result of delay.

The Court: What you haven't got for me, I think, is something which shows that there had to be two operations because of the trip from Baltimore to Korea and back to the West Coast.

Mr. Rassner: Of course, I have taken the position, and in view of your Honor's comment, that the condition was worsened from the time in July to Baltimore. I think we should be entitled to (651) include that in our cause of action. I would like to renew my motion.

The Court: No, I don't think I have a right to change your pleadings on that now. You were in no sense deprived, Mr. Rassner. As a matter of fact, not only have you been in this case since all this year but this case has been marked out for trial in this part beyond all possibility of settlement for at least a week before trial.

Mr. Rassner: It is not a case of surprise, your Honor. I told counsel, and the record so indicates, that I would move at the trial to add an additional cause of action. I cannot add it?

The Court: Now, frankly, you have raised that point, I think what we did here was conduct a war of nerves against your opponent. You suggested various types of things you might do but you never told him what you were going to do, and he was forced to prepare for trial. And even during the trial, even despite repeated concessions by you, he kept proving everything that he thought—or trying to disprove everything he thought you might ultimately try to prove or amend your pleadings to include. (652) I think there is a limit to that sort of thing and this goes beyond it. So I am going to deny your application to amend.

• • • •

Plaintiff's Exhibit 4

Doctor's Report, Bremen, Germany

(OFFSET)

[*For convenience of Court and Counsel this Copy is bound in on the opposite page.*]

Dr. med. E. B. Stade
prakt. Arzt

Schleifmühle 38 — Telefon 2 43 23

Sprechstunden: 8—10 und 16—17 Uhr
außer Mittwoch- und Sonnabendnachmittag

Bremen, den 17. 1. 1952

Mr. Costas MACRIS
has a beginning of
a hernia in the left
inguinal region.
It's in the moment
not good for him
to have this.

Dr. Stade

Dr. med. ERICH B. STADE
Arzt

BREMEN, den 18. 1. 1952
Schleifmühle 38
Telefon 2 43 23

Dr. of "Eingeladen"
Tor Bremen

Für ärztliche Bemühungen erlaube ich mir zu berechnen

DM 90,—

For treatment of
Mr. P. Dracos
" G. Macris
" D. Ginzepis
" N. Georgopoulos

Bremer Bank
Konto Nr. 6870
Postscheckkonto
Hamburg 8115

Betrag dankend erhalten

Bremen, den 18. 1952

Dr. Stade

Plaintiff's Exhibit 4
(p. 430)

SERAPHIM FERRAMENTA M. D. (p. 45a-2)

Consulter-Office:
Pedro II, 76-3 rd Floor
Rooms 16-17-18
Consulting hours:
10.00-12.00 hrs.
15.00-18.00 hrs.
Telefone, 2-4544

Residence:
Rua Firmino Barbosa N. 8
Telefone, 4-3928

SANTOS

SANTOS MARCH 14 . 1952.

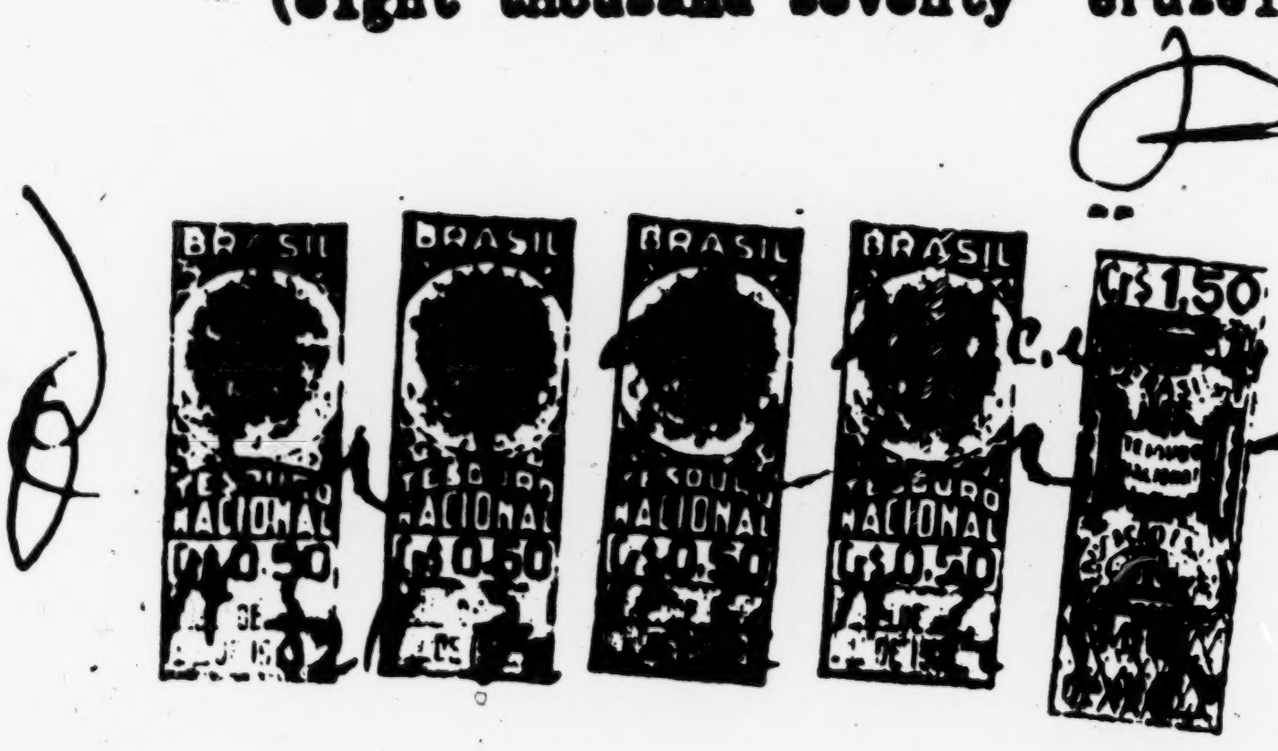
S/S " EURYVIADES "

For medical treatment rendered to

Users:	---Diagnosis---		
DANIEL HERNANDES.....	Bronchitis	Cr.$	240,00
GROUZIS OMIROS.....	Acne.....	Cr.$	290,00
NICOMEDES VALENCH.....	Dermatite. Disentery.....	Cr.$	240,00
SOTIRIOS STATARIS.....	Gastritis.....	Cr.$	360,00
NICOLAS GEORGOPOULOS..	Dermatite.....	Cr.$	720,00
NICOLAS GEORGOPOULAS..	Neurite.....	Cr.$	360,00
VENTURA GERASIMOS.....	Artritis.....	Cr.$	180,00
METROPOULAS.....	Lack of vitamin B.....	Cr.$	180,00
CONSTANTIN MACRIS.....	Little hernial point.....	Cr.$	300,00
G. TSORTATOS.....	Dispepsy.....	Cr.$	180,00
LEFTERATOS.....	Sinusitis. Cut on the hand.	Cr.$	780,00
MAGOULAS.....	Inflammation of gall blader	Cr$	180,00
LUCAS GONZALES.....	Appendicitis--Including the surgical intervention and assistance in hospital...	Cr.$	8.200,00
GERASIMATOS.....	Lack of vitamin B.....	Cr.$	180,00
GEORGE COLON.....	Arthritis.....	Cr.$	240,00
MILTIADIS SPIRATOS....	Bloqueio	Cr.$	420,00

Cr.$8.070,00

(eight thousand seventy cruzeiros)



DROGASIL LIMITADA

SÉDE SOCIAL: Rua Santo Amaro, 354 — Telefone 33-1121 — SÃO PAULO

(p. 45a - 3)

Memorandum da Filial: FARMASIL BÊTA

Rua General Câmara, 34 — Telefones: 4077 e 4014 — SANTOS

COPIAS DE N/NOTAS E-D Nº 11686-11687-11688-11689-11691

SANTOS, 12 DE MARÇO DE 1956

S/S EURIVIADES

S a n t o s

Sr. Luiz

NOTA Nº 11686

MR. MAGONLOS

1 V. DEPANCOL DRAG. C/25	41,10	41,10	
MR. [illegible] O. GRUZIS			
5 V. UIBIOTYL 1,0	64,80	324,00	
MR. CONSTANTION NEGRIS			
1 V. LUTISANOL	21,50		
1 FUNDA ELASTICA AD.	108,00	129,50	
MR. D. PORTALOS G.TZORLATOS			
1 V. PANTOPE?	45,00	45,00	539,60

NOTA Nº 11687

SR. NICOLAS GEOMOUMLOS

1ºV. BELA CEVALIN COMPOSTO C/40	6[illegible],00		
1 V. DECOVIT C/30	[illegible]	1[illegible],80	
SR. NICOMEDES VALENCIA			
2 CX. LACIPAN	49,00		
1 MUCO ANTIPHYIOL	21,50		
1 V. DECOVIT C C/30	67,20		
1 T. NOVALGINA COMPS.	23,30	161,00	291,20

NOTA Nº 11688

AR. DOUROS SIAIMARIS

1 V. ALUCOL COMPOSTO	52,60		
2 PT. SULFATO BARIO HERALCA	140,024,00	76,60	
MR. GROUZIS OMIROS			
2 T. STOPTON PASTA	45,20		
1 V. CINALGINA C/10	12,00	57,20	
MR. METROPOLOS			
1 P. TOLER	15,50		
1 V. BETAIODAL	37,60	53,10	186,90
			1.017,70

A TRANSPORTAR

Plaintiff's Exhibit 5

Doctor's Report, Santos, Brazil

(OFFSETS)

[*For convenience of Court and Counsel these Copies are bound in on the opposite page.*]

Plaintiff's Exhibit 5

(p. 45a -1)

Co.

MARRIS,

Dis in Urology Dept

Hermans

Mattingly

Yanamura

Maintenance

Later

Secret

This Doc fitted him with Truss.

Dr. SERAPHIM FERRAMENTA

MÉDICO

Consultório:
R. D. Pedro II, 76 - 3.o Andar
Salas 16 - 17 - 18
Horário:
Des 10,00 às 12,00 horas
Des 15,00 às 18,00 horas
Telefone, 2-4544

SANTOS

Residência:
Rua Firmino Barbosa N.° 8
Telefone, 4-3928

Santos
Brazil
3/12/52

Bill to ship
for Elastic Belt
for hernia

DROGASIL LIMITADA

SÉDE SOCIAL: Rua Santo Amaro, 554 — Telefone 33-1121 — SÃO PAULO

(p. 45 a - 4)

Memorandum da Filial: FARMASIL BÉTA

Rua General Câmara, 34 — Telefônes: 4677 e 4914 — SANTOS

TRANSPORTE 1.017,70

NOTA Nº 11609

MR. GEORGE COLON

1 V. HEPANEURIM LIG.	37,60		
1 T. NOVALGINA COMPS.	23,30		
1 CX. NECROTON 3X5CC HOSP.	81,00	141,90	

Duplicata nº. 1.879

MR. DANIEL HERNANDES

1 T. CORAMINA R. COMPS.	34,60		
2 V. DURACILIN AQUOSO 400000	70,00	104,60	246,50

NOTA Nº 11.691

MR. LEFTERATOS

4 V. DIBIOTYL	64,80	259,20	
1 T. ANTITETANICO I.P.1500x2CC	12,30	12,30	271,50
		CR.$	1.535,70

(HUM MIL, QUINHENTOS E TRINTA E CINCO CRUZEIROS E SETENTA CENTAVOS.)

(47a)

CERTIFICATE OF MEDICAL CARE

FROM: NAME AND ADDRESS OF U. S. PUBLIC HEALTH SERVICE HOSPITAL, OUTPATIENT CLINIC, OR OUTPATIENT OFFICE

DATE: 2/8/55 RGB

NAME OF PATIENT: Constantinos Macris

CLASS OF BENEFICIARY: Immig.

REGISTER NUMBER: 123853

ADDRESS: on ship

DESCRIPTION	DATE OF BIRTH	HEIGHT	COMPLEXION	COLOR HAIR	COLOR EYES
	age 25				

NAME OF VESSEL: SS Euryviades

DATE LAST SERVED ABOARD:

TREATMENT RECEIVED

HOSPITAL—INPATIENT ☐ FROM ..... TO ..... OUTPATIENT ☒ FROM 4/8/52 TO 4/8/52

DISPOSITION:

DISCHARGED AS INPATIENT ☐
DISCHARGED AS OUTPATIENT ☐
STILL UNDER TREATMENT ☐

REASON:

WITH MEDICAL CONSENT ☐
AGAINST MEDICAL ADVICE ☐
A. W. O. L. ☐

REASON FOR PRESENT ADMISSION

Patient was examined at request of Immigration authorities.

OPERATIONS

PERTINENT DIAGNOSES FOR PRESENT ADMISSION	CONDITION ON ABOVE DATE	DEGREE OF RECOVERY ANTICIPATED AND EXPECTED DATE
1. Bilateral inguinal herniae	Fit for light work not involving heavy lifting	
2.		
3.		
4.		

REMARKS

RETURN APPOINTMENT .....

SIGNATURE OF MEDICAL OFFICER OR MEDICAL RECORD LIBRARIAN: M. Loyola Voelker

SIGNATURE OF PATIENT:

M. Loyola Voelker

U. S. GOVERNMENT PRINTING OFFICE 16—65827-1

81

Plaintiff's Exhibit 6

Marine Hospital Report, Baltimore, Md.

(OFFSETS)

[For convenience of Court and Counsel these Copies are bound in on the opposite page.]

Defendants' Exhibit D

LAW OFFICES
GUSTAVE A. GERBER
120 West 42nd Street
New York 18, N. Y.

WIsconsin 7-3722

July 22, 1952

Petmar Agencies, Inc.
17 Battery Place
New York City, New York

Re: Claims of Macris

Gentlemen,

We herewith reduce to writing the essence of our telephone conferences of the past few days, with regard to the claims of Constantine Macris, who had served your Agencies as Second Mate on the S/S "Enriviades", flying the Liberian Flag.

As to Money Claims:

Mr. Macris claims compensation for earned vacation time, in the amount of $74.50; for service in war waters, $137.19; and for Saturday and Sunday work, $352.78.

Payment in the total amount of $564.47, is hereby demanded.

As to Surgical Treatment and Hospital Care:

As you have been informed by us, it is Mr. Macris' election to receive surgical treatment and hospital care, as is indicated for and required by him, here in the United States.

Defendants' Exhibit D

If his reasons are of any interest to you, they are as follows:

1. He believes that such care and treatment here will be of higher and better quality;

2. He feels that after cure, his opportunities will be better here for rehiring.

We regret that your indicated feeling is not to provide the aforesaid treatment here, but that you are insisting upon his repatriation and having him shipped back to Greece. We respectfully indicate to you our belief that it is wholly within the right of the seaman to elect whether he will be repatriated for the purposes of medical and surgical treatment; and as has been stated, Mr. Macris elects to be treated here, and demand is hereby made for his maintenance and care.

We trust you will reconsider your present position, on this matter. Otherwise you will leave us with no alternative but to proceed to make the necessary arrangements, in his behalf, charge the same to your account, and proceed to the enforcement and collection thereof.

It is our hope that you will reconsider your presently announced refusal. Your immediate response is requested.

Very truly yours,

GUSTAVE A. GERBER
Gustave A. Gerber

gag:ds
ANGY-1

Defendants' Exhibit H

Form I-259
U. S. DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE
(Edition 2-1-44)

NOTICE TO DELIVER, DETAIN ON BOARD, OR REMOVE ALIENS

PORT OF Baltimore, Md 4-5, 1955

To the Owner, Agent, Consignee, Master or Officer in Charge of the

Lib SS. Eurysiades
Texas Transport & Term. Line.

Pursuant to the provisions of the Acts of February 5, 1917, December 26, 1920, and May 26, 1924, and the Immigration Regulations issued by the Attorney General thereunder, you are hereby directed to

Erase two
~~deliver to~~
detain on board at all U. S. Ports and deport
~~remove to~~

ON board
†(Place of delivery or detention)

the following-named aliens, with their baggage, your attention being invited to the appropriate sections of the statutes appearing on the reverse side hereof, and regulations made thereunder:

NAME	STATUS ON VESSEL (1st, 2d, 3d, or tourist class passenger; member of the crew; stowaway, etc.)
Constantinos Macris 34	Greek, 2nd Mate
	Malafide
Ioannis Hatzimanolis 27	Greek
	Malafide

EXHIBIT H
U. S. Dist. Court
S. D. of N. Y.
21 OCT 1955
ADM

BY DIRECTION OF THE IMMIGRATION AND NATURALIZATION OFFICER IN CHARGE.

James Graham
U. S. Immigrant Inspector.

Receipt of the above notice is hereby acknowledged April 5,
19 55 at 4:30 P. M.
(Time)

(Signature)

Master
(Title of person signing receipt)

(OVER)

U. S. GOVERNMENT PRINTING OFFICE 16—18027-1

EXTRACT FROM THE ACT OF FEBRUARY 5, 1917

SEC. 1. * * * That the term "seaman" as used in this act shall include every person signed on the ship's articles and employed in any capacity on board any vessel arriving in the United States from any foreign port or place.

SEC. 10. (As amended by Sec. 27 of immigration act of 1924.) That it shall be the duty of every person, including owners, masters, officers, and agents of vessels of transportation lines, or international bridges or toll roads, other than railway lines which may enter into a contract as provided in section 23, bringing an alien to, or providing a means for an alien to come to, the United States, to prevent the landing of such alien in the United States at any time or place other than as designated by the immigration officers. Any such person, owner, master, officer, or agent who fails to comply with the foregoing requirements shall be guilty of a misdemeanor and on conviction thereof shall be punished by a fine in each case of not less than $200 nor more than $1,000, or by imprisonment for a term not exceeding one year, or by both such fine and imprisonment; or, if in the opinion of the Attorney General, it is impracticable or inconvenient to prosecute the person, owner, master, officer, or agent of any such vessel, such person, owner, master, officer, or agent shall be liable to a penalty of $1,000, which shall be a lien upon the vessel whose owner, master, officer, or agent violates the provisions of this section, and such vessel shall be libeled therefor in the appropriate United States court.

(b) Proof that the alien failed to present himself at the time and place designated by the immigration officers shall be prima facie evidence that such alien has landed in the United States at a time or place other than as designated by the immigration officers.

Extract from Section 15

SEC. 15. That * * * *immigration officials may order a temporary removal of such aliens for examination at a designated time and place, but such temporary removal shall not be considered a landing, nor shall it relieve vessels, the transportation lines, masters, agents, owners, or consignees of the vessel upon which said aliens are brought to any port of the United States from any of the obligations which, in case such aliens remain on board, would under the provisions of this act bind the said vessels, transportation lines, masters, agents, owners, or consignees:* * * *Whenever a temporary removal of aliens is made the vessels or transportation lines which brought them and the masters, owners, agents, and consignees of the vessel upon which they arrive shall pay all expenses of such removal and all expenses arising during subsequent detention, pending decision on the aliens' eligibility to enter the United States and until they are either allowed to land or returned to the care of the line or to the vessel which brought them, such expenses to include those of maintenance, medical treatment in hospital or elsewhere, burial in the event of death, and transfer to the vessel in the event of deportation, excepting only where they arise under the terms of any of the provisos of section eighteen hereof. Any refusal or failure to comply with the provisions hereof shall be punished in the manner specified in section eighteen of this act.*

EXTRACT FROM THE ACT OF DECEMBER 26, 1920

An Act to provide for the treatment in hospital of diseased alien seamen.

* * * That alien seamen found on arrival in ports of the United States to be afflicted with any of the disabilities or diseases mentioned in section 35 of the act of February 5, 1917, * * * shall be placed in a hospital designated by the immigration official in charge at the port of arrival and treated, all expenses connected therewith, including burial in the event of death, to be borne by the owner, agent, consignee, or master of the vessel, and not to be deducted from the seamen's wages, and no such vessel shall be granted clearance until such expenses are paid or their payment appropriately guaranteed and the collector of customs so notified by the immigration official in charge: *Provided*, That alien seamen suspected of being afflicted with any such disability or disease may be removed from the vessel on which they arrive to an immigration station or other appropriate place for such observation as will enable the examining surgeons definitely to determine whether or not they are so afflicted, all expenses connected therewith to be borne in the manner hereinbefore prescribed. * * *

EXTRACT FROM THE ACT OF MAY 26, 1924

SEC. 3. When used in this act the term "immigrant" means any alien departing from any place outside the United States destined for the United States, except * * * (5) a bona fide alien seaman serving as such on a vessel arriving at a port of the United States and seeking to enter temporarily the United States solely in the pursuit of his calling as a seaman. * * *

SEC. 19. No alien seaman excluded from admission into the United States under the immigration laws and employed on board any vessel arriving in the United States from any place outside thereof, shall be permitted to land in the United States, except temporarily for medical treatment, or pursuant to such regulations as the Attorney General may prescribe for the ultimate departure, removal, or deportation of such alien from the United States.

SEC. 20. (a) The owner, charterer, agent, consignee, or master of any vessel arriving in the United States from any place outside thereof who fails to detain on board any alien seaman employed on such vessel until the immigration officer in charge at the port of arrival has inspected such seaman (which inspection in all cases shall include a personal physical examination by the medical examiners), or who fails to detain such seaman on board after such inspection or to deport such seaman if required by such immigration officer or the Attorney General to do so, shall pay to the collector of customs of the customs district in which the port of arrival is located the sum of $1,000 for each alien seaman in respect of whom such failure occurs. No vessel shall be granted clearance pending the determination of the liability to the payment of such fine, or while the fine remains unpaid, except that clearance may be granted prior to the determination of such question upon the deposit of a sum sufficient to cover such fine, or of a bond with sufficient surety to secure the payment thereof approved by the collector of customs. The Attorney General may, upon application in writing therefor, mitigate such penalty to not less than $200 for each seaman in respect of whom such failure occurs, upon such terms as the Attorney General in his discretion shall think proper. This section, as amended, shall apply to all penalties arising subsequent to June 5, 1940.

(b) Proof that an alien seaman did not appear upon the outgoing manifest of the vessel on which he arrived in the United States from any place outside thereof, or that he was reported by the master of such vessel as a deserter, shall be prima facie evidence of a failure to detain or deport after requirement by the immigration officer or the Attorney General. * * *

† When delivery to the immigration station is directed, the aliens must be detained on board of the ship on which they arrived pending delivery to the immigration station. Such transfer must be made by the most direct and expeditious route with the least possible contact with the public, and at the expense and responsibility of the steamship company. Aliens who have been held for further medical examination in the belief that they are suffering from communicable diseases must be completely isolated from other passengers and from the public.

16—18027-1

Defendants' Exhibit E

LAW OFFICES
GUSTAVE A. GERBER
120 West 42nd Street
New York 18, N. Y.

WIsconsin 7-3722

July 30, 1952

Petmar Agencies, Inc.
17 Battery Place
New York City, New York

Re: Claims of Constantine Macris

Gentlemen,

We write you with regard to the provision of medical and surgical care and maintenance to be supplied by you for Mr. Constantine Macris, who has served the S/S "Euriviades", as Second Mate.

Confirming understandings had with and through your attorney Renato Giallorenzi, Esq., in view of the fact that Mr. Macris has elected to take his medical and surgical treatment here, he is waiving his right to repatriation to Greece, under his present or recent Articles.

As to Mr. Macris' money claims, as per our letter under date of July 22, 1952, we understand that this matter is now under proper investigation and that we shall have prompt notice of your disposition thereof.

Very truly yours,

GUSTAVE A. GERBER
Gustave A. Gerber

gag:ds

DELIVERY BY HAND
RATIFIED AND CONFIRMED:

C. MACRIS
Constantine Macris

Defendants' Exhibit J

Baltimore, April 14, 1952

AFFIRMATION

The Undersigned, Constantinos Makris, Second Officer S.S. "Evryviades", affirm that Mr. Panag. Drakatos, Master of the above steamship, has acted through the local Authorities and succeeded in obtaining my repatriation to Greece, by the S.S. "Nea Hellas", sailing on May second of this year, so that I submit to Surgery for both-side Hernia, which I suffered during my work on the above mentioned vessel. The Captain in question, would also pay my passage to Piraeus. Because however, it is intended that I stay in Ellis Island, where Aliens in America are detained, until the above date, viz (18) eighteen days from to-day, I prefer to remain as member of the crew, under my rating of Second Officer, releasing the Captain, personally, in the event that any complication occurs, due to my Hernia. It must be noted that the Department of Aliens (Immigration) here, confined me within the vessel, during my stay here, because I had come to America for the first time.

The Affirmant

(Sign.) C. MAKRIS

Defendants' Exhibit J

State of New York,
County of New York—ss.:

EUGENE ANTONIADES, being duly sworn, deposes and says:

That I am a naturalized citizen of the United States and reside at No. 159-00 Riverside Drive West, New York, N. Y.

That I am familiar with both the Greek and English languages and that I have translated the annexed document and that the annexed translation is, to the best of my knowledge and belief, a true and correct version of said document.

EUGENE ANTONIADES

Sworn to before me this
6th day of October, 1955.

LENORE SCALLEY
Lenore Scalley
Notary Public, State of New York
No. 41-8778800
Qualified in Queens County
Cert. filed in New York Co. Clk.
Commission Expires March 30, 1956

(Seal)

Defendants' Exhibit K

REQUEST AND RECEIPT

To: Captain
SS "Euryviades"

Dear Sir:

It is cordially requested that a payment of 1,050,000 wons* (W1,050,000.00) be made for medical treatments of SS "Euryviades" crews, details of which are as follows:

G. Giennoutsos	Treatments for 15 times	W500,000.00
C. Tsandoulis	Finger Operation	50,000.00
	Penicillin and others	50,000.00
D. Guizepis	Injection	100,000.00
N. Mitzopoulos	Injection	85,000.00
Ch. Cohlios	Treatment of stomach	150,000.00
C. Macris	Examination	25,000.00
J. Hatzimanolis	Examination	25,000.00
G. Drakakos	Examination & medicines	65,000.00
	Total	W1,050,000.00

* Official exchange rate is 6,000.00 Wons to one U. S. Dollar (U. S. $1.00).

This is to acknowledge the receipt of above amount of pay on this fifteenth day of June, 1952.

KIM WAN KILL HOSPITAL
8 Bahnwol-dong,
Masan, (Korea)

s/ Dr. Kim Wan Kill

Defendants' Exhibit K

State of New York,
County of New York—ss.:

TAE JIN KAHNG, being duly sworn, deposes and says:

1. That I am a native Korean, and a citizen of the Republic of Korea, and at present I reside at 500 Riverside Drive, in the City and State of New York, and I am engaged in studies at Columbia University.

2. That I am familiar with both the Korean and English languages and have translated the annexed document and I hereby certify that the said translation is a true and correct translation of the contents of the said document.

TAE JIN KAHNG

Sworn to before me this
29 day of September, 1955.

SAMUEL BUSCEMI
Samuel Buscemi
Notary Public, State of New York
No. 31–5546800
Qualified in New York County
Cert. filed with N. Y. Co. Clks. & Reg. Off.
Term expires March 30, 1956

(Seal)

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SEP 16 1957
JOHN T. FEY, Clerk

Supreme Court of the United States

October Term, 1957

No. 469

CONSTANTINE MACRIS,

Petitioner,

against

SOCIEDAD MARITIMA SAN NICOLAS, S.A., and PETMAR AGENCIES, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS OF THE UNITED STATES, FOR THE SECOND CIRCUIT

JACOB RASSNER,
Attorney for Petitioner.

THOMAS F. FRAWLEY,
on the Brief.

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Supreme Court of the United States

October Term, 1957

No.

—o—

CONSTANTINE MACRIS,

Petitioner,

against

SOCIEDAD MARITIMA SAN NICOLAS, S.A., and
PETMAR AGENCIES, INC.,

Respondents.

—o—

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS OF THE UNITED STATES, FOR THE SECOND CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Constantine Macris, prays that a writ of certiorari issue to review the decision of the United States Circuit Court of Appeals for the Second Circuit, entered on June 17, 1957.

Official Report of the Court Below

The decision of Lawrence E. Walsh, Judge of the District Court for the Southern District of New York, dated December 31, 1955, is reported in 19 Fed. Rules, Decisions, page 397 (Appendix A).

The decision of the Circuit Court of Appeals for the Second Circuit has not been officially reported (Appendix B).

Jurisdiction

The opinion of the court below was filed on June 17, 1957.

Jurisdiction to review this decision is predicated upon Title 28, U. S. C., Section 1257.

Original jurisdiction is based upon diversity of citizenship.

Questions Presented

When in the course of maritime employment aboard a merchant vessel a seaman suffers serious and permanently disabling injuries as a direct consequence of performing services under the direction of his superior, are the consequences of such injuries to be borne by the vessel or by the injured person; it being a natural hazard and one of the risks incidental to maritime service for a seaman to be exposed to the danger of injury in the performance of his duties aboard a vessel often without any provable cause of unseaworthiness or negligence?

Should a seaman thusly injured be left without remedy, under the ancient doctrine of assumption of risk or does present day progress, in merchant shipping, impel the interpretation of legal liability so as to place financial responsibility on the industry, in the service of which such seaman became disabled, through no fault of his or the vessel's, while performing services in the furtherance of the ship's business?

Does the refusal of a trial court to permit an amendment of the complaint so as to include the original injuries in an action predicated upon an aggravation of such injury constitute a denial of due process of law?

Reasons for Granting the Writ

Prior to the decision by Judge Learned Hand in the case of *Keen* v. *Overseas Tankship Corporation*, 194 Fed. (2) 515, ship owners were absolved from liability for the consequences of personal injuries suffered by a seaman, in the absence of negligence or unseaworthiness.

Judge Hand expressed the view that modern shipping industry warranted a departure from the old principle of law of assumption of risk incidental with the employment and expressed the view that industry should bear the consequences of the injuries suffered in such industry.

The refusal of a trial court to permit an amendment of a complaint, predicated upon an aggravation of an injury, to include the original accident as part of the cause of action, seems to be a denial of due process of law, within the provisions of the Fourteenth Amendment, and which supports a petition for a writ of certiorari so as to guaranty to seamen a full opportunity to assert all facts incidental to his crippling injuries.

Statement

There is no issue of fact herein contained.

The facts are clearly and accurately set forth in the opinion of Judge Walsh, including the footnotes (Appendix A).

Argument

The present interpretation of applicable law is that obedience to an order which "unduly" exposes a seaman to injury relieves the seaman of the charge of contributory negligence and imposes a liability on the ship owner. *Socony-Vacuum Oil Co., Inc.* v. *Smith*, 305 U. S. 424.

Our courts have made considerable progress in giving legal safeguards to provide maintenance and cure irrespective of the manner of the happening of an accident or the occurrence of an illness during the maritime employment, but have not expressed any view except that of Judge Learned Hand in the *Keen* case, *supra*, holding a ship owner liable for the consequences of injury suffered in obedience to a direct order except where the order was improvident.

Stare decisis does not answer the question herein presented, as to whether liability would lie in the event that the order was not improvident.

It would appear that progress calls for consideration by this Honorable Court of the thoughts expressed by Judge Leanerd Hand in the *Keen* case, *supra*, that industry and not the injured man should be called upon to bear the consequences of disabling injuries, innocently suffered, while carrying out the services of his employment under a specific direction of his superior, without any fault on anyone's part.

It is frequently impossible to demonstrate unseaworthiness or fault so as to constitute proof of unwarranted exposure.

Modern progress warrants clarification of the law, so as to assure to a seaman recovery for injuries suffered while obeying the order of the superior, irrespective of whether the order was wisely or improvidently issued. All duties aboard a ship are hazardous, and no one can draw a distinctive line of demarcation between a provident and an improvident order.

Under the present state of the law, such obedience relieves the seaman of the charge of contributory negligence, but, at the same time, renders immunity to the shipowner for the consequences of the disabling effects of the injuries justly suffered.

As to the question of amendments of the complaint, it would appear that this Honorable Court has laid down a principle of law that all the facts, and the facts and justice only, should determine a decision in a case, and not technical considerations. *Pope & Talcott* v. *Hawn*, 346 U. S. 406.

This would seem particularly true where the evidence of an accident and the manner of its occurrence was testified to by the plaintiff, under circumstances where defense counsel had been advised that such evidence might or might not be offered and where defense counsel was not taken by surprise, seems to warrant the granting of a motion to amend the complaint so as to include the original accident, in a cause predicated on aggravation of conditions suffered in the very accident in question.

The learned trial court, as a substantial part of the basis for denying the plaintiff's motion, at the close of the plaintiff's case, to amend the pleadings to conform to the proof, concluded that there was no applicable law which would support a decision granting damages to an injured seaman for injury suffered while obeying a specific order of his superior without proof of negligence or unseaworthiness on the part of the ship owner.

It would thus seem that although the court was not sympathetic to the attitude adopted by the seaman's trial counsel, the trial court nevertheless very judiciously considered the merits of the amendment and apparently would have granted the motion, despite his personal feelings, if there were *stare decisis* to support a recovery for damages resulting from injuries suffered while performing ship's services in obedience to his superior's direct order.

The court below approved the trial court's decision, but, likewise, gave very serious consideration to the merits of the case, and concluded that there was no prejudicial error

because the seaman could not have recovered on the proposed amended complaint, in the absence of proof of unseaworthiness or negligence.

The trial court stated, in its footnote, as follows:

> "Indeed there was no proof of lack of seaworthiness of the vessel or negligence of defendants. Plaintiff was Second Mate. While tying up to the pier in Bremen, plaintiff was in charge of the crew on the stern, one line had been put ashore and was taken to the niggerhead of the winch. A second line was put ashore and it was necessary to heave in the slack by hand. Plaintiff, at the direction of the master, joined with the crew in pulling on the line and in the course of this work sustained his hernia. There was no claim that the crew was inadequate. The claim of fault insofar as the causation of the injury was concerned apparently is that plaintiff was required to do something which was not the duty of the Second Mate, a claim supported only by plaintiff's own opinion."

The Court below stated, at page 1677:

> "The denial of the motion to amend was not prejudicial in any event, however, for the simple reason that the evidence failed to show any breach of duty to Macris on the part of the defendants prior to the ship's arrival in Baltimore. There was no proof that unseaworthiness of the vessel or the defendants' negligence was a cause of Macris' original injury at Bremen."

It is obvious, from the foregoing, that the impelling reason by both the trial court and the Appellate Court below, was that mere obedience to a superior's order, in the absence of proof of negligence or unseaworthiness, does not constitute a basis for liability for injuries suffered during the performance of such duties.

Conclusion

In view of the fact that all work aboard a ship entails some degree of hazard and that the line of demarcation between an improvident order and a proper order is impossible of differentiation, uniformity of decision is completely absent, and one seaman, in one tribunal, may have a recovery on the identical facts which may be considered inadequate in another court.

In the interest of uniformity of decision in Admiralty, and in the interest of substantial justice, we respectfully submit that there is a special and important reason warranting the exercise of the judicial discretion by the United States Supreme Court considering the questions herein presented.

Respectfully submitted,

JACOB RASSNER,
Attorney for Petitioner.

THOMAS F. FRAWLEY,
on the Brief.

Appendix A

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

CONSTANTINE MACRIS,

Plaintiff,

against

SOCIEDAD MARITIMA SAN NICOLAS, S. A. and PETMAR AGENCIES, INC.,

Defendants.

Appearances:

JACOB RASSNER, Esq., Attorney for Plaintiff, 15 Park Row, New York City, New York.

RENATO C. GIANLORENZI, Esq., Attorney for Defendants, 50 Broad Street, New York City, New York.

OPINION

WALSH, *D. J.*

This was an action by a seaman against his employer to recover for disability resulting from effects of anesthesia administered in an operation to repair a hernia. He claimed that the hernia had been aggravated by acts and omissions of the defendants during a voyage from Baltimore, Maryland to Japan and return to San Francisco, and that this aggravation made necessary two operations instead of one and thereby caused the disability complained of. At the close of the case, his claim was dismissed for failure to

prove any change of condition during the voyage. Thereafter, he sought to amend his complaint to state a claim for the original hernia and its aggravation during the voyage prior to arrival in Baltimore.[1] This motion was denied and plaintiff now seeks reargument.

Plaintiff is a Greek national; defendant Sociedad Maritima San Nicolas, S. A., a Panamanian Corporation; and defendant Petmar Agencies, Inc., a Delaware Corporation. The vessel on which plaintiff was employed is of Liberian registry.

Plaintiff was employed in Greece as Second Mate. From there the vessel sailed to Bremen, Germany; Santos, Brazil; and then to Baltimore, Maryland. In Bremen, plaintiff sustained a hernia. He was examined there and in Santos. In Baltimore he signed off the vessel for return to Greece for treatment, but, faced with a few days detention at Ellis Island awaiting the ship to carry him to Greece, he, at his own request, signed back on and made the trip from Baltimore to Japan and back to this country.

Plaintiff limited his claim to aggravation of his condition after his re-employment in Baltimore. By so doing he believed that he strengthened his contention that this Court should assume jurisdiction of the subject matter and that the Jones Act was applicable. This position was maintained consistently throughout the trial. Plaintiff did offer proof of the prior events at Bremen and Santos, but this proof was received solely upon the issue of defendants' duty subsequent to re-employment in Baltimore—not as to possible fault of the defendants in Bremen or between Bremen and Baltimore. Defendants objected to its receipt for any purpose. Plaintiff acquiesced in the Court's limitation. He did not at that time seek to amend his complaint.

---

[1] At the close of his case, before the ruling of the Court, plaintiff's counsel moved perfunctorily to conform the pleadings to the evidence but declined to state in what particulars amendment was sought

Appendix A

Plaintiff's motion to amend, at the close of the trial, was made under Rule 15(b), as a motion to conform the pleadings to the evidence. This was not a proper case for amendment under Rule 15(b) because proof had not been taken as to the claim attempted to be added to the complaint, except as incidental to other matters.[2] Even to this extent it was taken not with the express or implied consent of the defendants but over their objection.

With respect to amendments under this subdivision Professor Moore says:

---

[2] Indeed there was no proof of lack of seaworthiness of the vessel or negligence of defendants. Plaintiff was Second Mate. While tying up to the pier in Bremen, plaintiff was in charge of the crew on the stern. One line had been put ashore and was taken to the niggerhead of the winch. A second line was put ashore and it was necessary to heave in the slack by hand. Plaintiff, at the direction of the master, joined with the crew in pulling on the line and in the course of this work sustained his hernia. There was no claim that the crew was inadequate. The claim of fault in so far as the causation of the injury was concerned apparently is that plaintiff was required to do something which was not the duty of the Second Mate, a claim supported only by plaintiff's own opinion.

After the plaintiff's injury was disclosed, the master had him examined by a doctor in Bremen. The doctor found that the plaintiff had the beginning of a hernia on both sides. An immediate operation was not recommended. At the next port of call,-Santos, Brazil, plaintiff was again examined by a doctor who recommended the wearing of an elastic belt which was purchased for plaintiff and worn until he arrived in Baltimore. When examined in Baltimore both by a private physician and the Marine Hospital, plaintiff was found to have a double hernia ready for operation but not one for which operation was emergent. He was found fit for light duty.

Neither the medical records nor the other proof gives any basis for concluding that the treatment and examination the plaintiff had received to that date was inadequate or improper. The wisdom of withholding an immediate operation was not litigated, although one of plaintiff's medical experts did testify that an early operation would have been much simpler than the one plaintiff ultimately underwent.

> "The purpose of an amendment to conform to proof is to bring the pleadings in line with the actual issues upon which the case was tried; therefore an amendment after judgment is not permissible which brings in some entirely extrinsic issue or changes the theory on which the case was actually tried, even though there is evidence in the record—introduced as relevant to some other issue—which would support the amendment. * * * ". 3 Moore's Federal Practice 846-47.

Simms v. *Andrews*, 10 Cir., 118 F. 2d 803, 807, held that amendment of a pleading under comparable circumstances was not proper. The court said:

> " * * * When the Trustee amended his pleadings, however, he did not amend them to conform to the proof, but set up an entirely new defense to the claim of the government. For the first time he pleaded the statute of limitations. This was not one of the issues in the original trial. Any evidence introduced at the time of the trial tending to bear on the statute of limitations was incidental to the question of notice and was not introduced for the purpose of this defense. An amendment after judgment stating a new cause of action or a new defense is not permissible under the guise of conforming the pleadings to the proof and the court was right in striking the amendments from the records and reinstating the original judgment. * * * ".

See also *United States* v. *City of Brookhaven*, 5 Cir., 134 F. 2d 442, 446; *Nordstrom* v. *McAllister Brothers, Inc.*, S. D. N. Y., 9 F. R. Service, 15b 1, Case 5. The proposed new claim, not having been an issue tried by express or implied consent of the parties, was not an amendment authorized by Rule 15(b).

Appendix A

The amendment sought is perhaps within the power of the court under subdivision (a) of Rule 15,[3] but even if it were within the power of the court under either subdivision (a) or subdivision (b), this was not a case in which the power should have been exercised. Plaintiff's failure to move to amend in advance of trial was deliberate and not excusable. Plaintiff's trial counsel had been retained nine months before trial. The case had been sent out for trial and settlement negotiations abandoned one week before the trial actually commenced. Even busy trial counsel had had adequate opportunity to familiarize himself with the case and to make his final decision as to the theory on which he intended to proceed. None of the testimony at the trial was unanticipated.

Plaintiff's counsel claims that the amendment should be allowed because defendants' counsel was not surprised. Plaintiff's counsel had in fact badgered his opponent with the *possibility* of this amendment and with others which he never requested[4] but he had never given notice of an intent to amend. The discussion of possible amendments was merely an incident in a war of nerves designed to keep defendants and the court guessing as to what plaintiff's claim would ultimately prove to be. These are tactics a court should decline to aid or abet.

Plaintiff's motion for reargument of the denial of leave to amend is denied.

There remains the question of the amount to which plaintiff is entitled as maintenance and cure. It is my

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[3] It is said that this power may be exercised even after trial. 1 Barron and Holtzoff Federal Practice and Procedure 888, Section 446.

[4] For example, during settlement conference plaintiff's counsel also threatened to amend the complaint to charge defendants with alleged inadequate treatment by the Marine Hospital as their agent. At the opening of the trial he disclaimed any such theory of liability

conclusion that he should receive $8.00 a day for a period from July 17, 1952 when he left the vessel, until January 5, 1953, except for the period from July 31, 1952 to September 24, 1952, when he was a patient in the Marine Hospital at Staten Island. After January 5, 1953 he was not entitled to maintenance and cure because he failed to return to the Marine Hospital for further treatment as directed.

This leaves, as a possible basis for future action, his claim based upon a corrective operation and recuperation therefrom if one is had.

It is so ordered.

Dated: December 31, 1955.

LAWRENCE E. WALSH,
United States District Judge.

Appendix A

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

—o—

CONSTANTINE MACRIS,

Plaintiff,

against

SOCIEDAD MARITIMA SAN NICOLAS, S. A. and PETMAR AGENCIES, INC.,

Defendants.

—o—

Appearances:

JACOB RASSNER, Esq., Attorney for Plaintiff, 15 Park Row, New York, New York.

RENATO C. GIALLORENZI, Esq., Attorney for Defendants, 50 Broad Street, New York, New York.

MEMORANDUM

WALSH, *D. J.*

The Court: I will tell you, let me make my comments and that will give you both something to shoot at. Let me start off with the motion addressed to the amendment of the pleadings. I am going to deny that motion. In the first place, I think the plaintiff has proceeded primarily on the basis of what had happened between Baltimore and New York anyhow. In the second place, I don't see any foundation, surprise or otherwise, which would justify changing the pleadings at this late date.

I am going to the merits, and I think I must conclude that there is no basis for recovery here except for maintenance and cure, and I will try to trace my reasoning.

The hernia occurred in Bremen. I don't think, under the pleadings, that what occurred before Baltimore is important except in so far as it explains what the various parties did in Baltimore; but I don't think, in any event, there was any proof here of any negligence or unseaworthiness of the vessel in Bremen. I think that a second mate on any vessel must be expected to be able to pick up a line and heave on it or lift it, and whether that is his ordinary duty or not, he cannot say that he has been put to some unanticipated or unreasonable task which would make the vessel liable if, through no one's fault, he suffers a hernia.

What gives me the most trouble, and I think that underlies fundamentally my conclusion, is that I think his hernia was just about as bad when he got to Baltimore the first time as when he got back to Staten Island for treatment. I think it did progress and get worse between Bremen and Baltimore, and at Baltimore it was described as a double hernia and we have a recommendation for an operation, not emergent but that it should be had as soon as time permits.

I don't recall anything in the record, and I listened carefully, and I have gone over my notes day by day, and I have been over them all again at the conclusion of the trial, I don't recall any proof that it got worse between Baltimore and his return to New York, other than the plaintiff's subjective feeling that he was getting worse. I don't recall anything which shows that the condition changed between Baltimore and New York. Dr. Hymes speculated that because the plaintiff was able to work when he went to Korea and needed an operation when he got back to New York that there must have been a change. Frankly, I think Dr. Hymes' speculation or his conclusion was not on very firm ground. Of all the experts, he was the only one whom I felt was a little bit reckless in some of his answers, and I don't give any weight to his opinion in that respect, that he speculates on that basis that the hernia worsened during the voyage. And I am not giving any weight to plaintiff's own subjective feeling that it got

worse, and I don't recall anything else in the record on the subject.

The doctor who examined him here for the defendant said that even when he arrived in New York, just before his operation, he was capable of continuing to work. In fact, I cannot see anything different in his appraisal of the hernia and that which was obtained at the Baltimore Marine Hospital and before Dr. Kelley in Baltimore.

Because of that, we don't get to the more difficult questions of the foreseeability of his bladder injury as a sequel of the delay in operation. Both Dr. Hyslop and Dr. Keating say that there really is no correlation, at least science has not been able to develop one; Dr. Keating says there is no correlation between successive operations and this kind of sequel, and Dr. Hyslop said there is no correlation between the amount of this drug administered and this kind of sequel. Dr. Keating did say there was a correlation between the amount of other types of drugs and comparable sequelae. However, this whole question would confront me only if I had concluded there was some change in the physical condition of the hernia between Baltimore and Staten Island. And if I had reached this point, then I would like briefs from counsel as to liability for unforseeable injury, but I don't think we get to that point, so I am not going to bother you or burden you with the request for briefs.

As to the nature of plaintiff's injury, I think that this man suffered from an atony of the bladder but, with the greatest respect for the defendants' expert, I don't attribute its cause to chronic prostatitis. I follow Dr. Hyslop's conclusion that it somehow resulted from the anesthesia administered on the second operation.

Because of my conclusion that there was no significant change in plaintiff's condition after his re-employment in Baltimore, under the present pleadings, it really doesn't make much difference whether we are under the Jones Act or the general maritime law. Until I heard Captain Draca-

tos testify that at the time of this voyage he and his brother were part owners of this vessel and that there was thus ownership outside of the Marchessini family, I had intended to follow plaintiff's contention and treat this as though it were an American defendant and to hold that the action was properly under the Jones Act. Now, in view of the fact that others had a beneficial interest in the vessel, I think I will give greater request to the form of the corporate setup and treat it as a Panamanian owner in fact as well as in form and, therefore, I will apply the general maritime law.

In any event plaintiff is entitled to maintenance and cure to the point of maximum cure. Actually, we don't have much in the record to help me compute that. Certainly, as to his sexual difficulty, Dr. Hyslop and experts on both sides, said that he hasn't reached his point of maximum cure and he is entitled to it. I will leave that to computations to be submitted to me by counsel or however you think best.

Just one thing before we leave. This is out of place and it goes back to Baltimore. As a matter of fact, I haven't reached that point, but I would like to make clear one thing: I do not believe that the plaintiff was overreached. I don't give weight to that part of his testimony which suggested that he was. Again, I am not sure that it is a question of dishonesty. I feel that the plaintiff at times has manifested a simple-mindedness and a lack of maturity in his appraisal of events, for example relying on gossip of soldiers as to the adequacy of hospital conditions in Pusan and, also in his own suspicion as to what went on with respect to the Immigration officials in Baltimore. I don't see anything in the record which justifies a conclusion that defendants tried to overreach him. I think they honestly tried to get him prompt medical attention and that they were certainly willing to return him to Greece for an operation, as he wished. Although, perhaps, they weren't ready to meet every whim he had, they tried to accommodate him, certainly to all reasonable lengths.

Appendix A

The waiver, regardless of its nature as a defense in itself, satisfied me that defendants were not trying to get plaintiff to continue his service with them at all costs. Its language shows a pretty tough attitude towards the plaintiff not any dishonest attempt to minimize his impaired physical condition in order to get him to continue in the ship's service. It was pretty blunt. It made it clear that he could come along on the voyage if he really wanted to but at his own risk. This was spelled out to the point of warning him that his compensation would be reduced to the extent that others had to perform his duties for him.

I realize that in giving legal effect to the waivers by seamen, we look at them with the greatest care and even suspicion. I think this waiver would stand up under such scrutiny but, because of my view on the underlying question of liability, I don't have to decide this question. The waiver does, however, reflect on the plaintiff's credibility to the extent that it shows that there was no overreaching in Baltimore and it supports the credibility of the ship's captain to that extent.

(Discussion between Court and Counsel.)

Mr. Giallorenzi: I would like something noted on the record about these motions. As I understand it the Court gave a decision, that you are not reserving decision?

The Court: No, I haven't reserved decision.

Mr. Giallorenzi: You have given your decision?

The Court: I have given my decision. Mr. Rassner thinks I am in error on certain points. He wants to, by brief or reargument, show me those errors, and I have said, "By all means, do so." He wants until two weeks after he gets the minutes. I would like to have it sooner than that.

(Further discussion between Court and Counsel.)

LAWRENCE E. WALSH,
United States District Judge.

Dated: October 31, 1955.

Appendix B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 258—October Term, 1956.

(Argued March 12, 13, 1957 Decided June 17, 1957.)

Docket No. 24058

—o—

CONSTANTINE MACRIS,

Plaintiff-Appellant,

—v.—

SOCIEDAD MARITIMA SAN NICOLAS, S.A. and PETMAR AGENCIES, INC.,

Defendants-Appellees.

—o—

Before:

HINCKS, STEWART and LUMBARD,

Circuit Judges.

Appeal from the United States District Court for the Southern District of New York, Lawrence E. Walsh, *Judge*.

Plaintiff appeals from a judgment, entered after trial without a jury, awarding him maintenance and cure, but dismissing his cause of action brought under the Jones Act, 46 U. S. C. A., § 688, and the general maritime law for personal injuries allegedly caused by his employer's negligence and by the unseaworthiness of the vessel on which he was employed. Affirmed.

Appendix B

JACOB RASSNER, New York City (Harvey Goldstein, of counsel), *for plaintiff-appellant.*

RENATO C. GIALLORENZI, *New York City, for defendants-appellees.*

STEWART, *Circuit Judge*:

Constantine Macris was originally hired as second mate of the S.S. EURYVIADES in November, 1951, at Piraeus in his native Greece. Two months later, when the vessel was being moored at Bremen, Germany, he "felt a pain" while engaged with other members of the crew in hauling in a line. The ship's captain sent him to a physician in Bremen, who informed him that he had a hernia and advised him to see a doctor at the next port.

From Bremen the vessel sailed to Santos, Brazil, where Macris was examined by a physician and provided with a truss. The ship then proceeded via Trinidad to Baltimore, Maryland, arriving there in April, 1952. At Baltimore Macris was again examined, this time both by a private physician and at a United States Public Health Service Hospital. He was found "fit for light work not involving heavy lifting," but an operation was recommended. He signed off the vessel, and arrangements were made for his transportation on a passenger ship scheduled to leave eighteen days later for Greece, where the operation could be performed.

Macris changed his mind, however, because he did not want to be detained at Ellis Island while awaiting passage home. He signed back on as second mate of the EURYVIADES on April 7, 1952. From Baltimore the ship sailed to Korea, returning to California in the summer of 1952. In California Macris again signed off the vessel for the purpose of having an operation. He traveled to New York at his

employer's expense, and underwent two operations at a hospital there in August of 1952. Afterwards Macris suffered physical impairment, allegedly caused by the administration of an anaesthetic in the course of the second operation. He remained in an out-patient status, but failed to return for further treatment after January 5, 1953, although directed to do so.

Macris' cause of action for negligence and unseaworthiness was based upon a clear cut and narrowly defined theory. The complaint was silent as to what had transpired before Macris decided to resume his employment in Baltimore. It alleged that he "signed articles" as second mate there on April 7, 1952. Recovery was sought upon the ground that his impaired physical condition at the time of his employment in Baltimore had been aggravated by the defendants' negligence and by the unseaworthiness of their vessel during the ensuing three month period. The claim was that this aggravation made necessary two operations instead of one and thereby caused his subsequent disability.

After a five day trial the district judge found that this cause of action had not been proved. The court found as a matter of fact that Macris' condition had not deteriorated during the period between April 7, 1952, when he signed the articles in Baltimore, and July 7, 1952, when he left the ship in California.

It is not contended here that the district court was in error in finding that the essential allegations of the complaint were not proved. The contention is rather that the trial court erroneously denied the plaintiff's motion to amend his complaint to conform to the proof under Rule 15(b) Fed. Rules of Civil Procedure.

At the trial the history of what had occurred from the time Macris was originally employed in Greece was received

in evidence, despite the narrow scope of the complaint. Defense counsel repeatedly objected to the admission of any evidence of events prior to Macris' reemployment in Baltimore, and the evidence was admitted by the trial judge only for the limited purpose of showing "the course of dealings between the parties before the hiring" at Baltimore.

At the close of the plaintiff's case, his counsel made a perfunctory motion "to amend the pleadings to conform to the proof," but failed to point out any variance between the evidence and the pleadings, or any change in the theory of the plaintiff's cause of action. When the trial judge inquired as to the reason for the motion, counsel replied, "Frankly, I don't see any actual need at the moment." The court denied the motion with leave to renew it at a later time. The motion was not renewed until after the court had announced an adverse decision. Only then did counsel indicate that he desired to broaden his pleadings to assert the defendants' liability for the original hernia in Bremen and for its aggravation during the voyage from Bremen to Baltimore.

The Court denied the motion upon the ground that no such issues had been tried by the express or implied consent of the parties, pointing out that "proof had not been taken as to the claim attempted to be added to the complaint" except "upon the issue of defendants' duty subsequent to reemployment in Baltimore," and that the defendants had objected to its receipt for any purpose. The court pointed out that plaintiff's counsel had had ample opportunity to familiarize himself with the facts of the case and had deliberately chosen the theory on which he intended to proceed. The court emphasized that plaintiff's counsel had "badgered" his opponent with the possibility of such an amendment as part of a "war of nerves," but had refrained from asking to amend until the case had been lost on the plaintiff's original theory.

Appendix B

Under the circumstances disclosed by the record, the trial court was clearly within its discretion in denying the motion to amend. *Simms* v. *Andrews*, 118 F. (2d) 803, 807 (10 Cir., 1941); *Wheeler* v. *West India SS Co.*, 205 F. (2d) 354 (2 Cir., 953), cert. den. 346 U. S. 889; *United States* v. *City of Brookhaven*, 134 F. (2d) 442, 446 (5 Cir., 1943).[1]

The denial of the motion to amend was not prejudicial in any event, however, for the simple reason that the evidence failed to show any breach of duty to Macris on the part of the defendants prior to the ship's arrival in Baltimore. There was no proof that unseaworthiness of the vessel or the defendants' negligence was a cause of Macris' original injury at Bremen. There was no proof that aggravation of his condition between Bremen and Baltimore, was so caused. There was no proof of any negligent failure to provide Macris with medical treatment either before or after the vessel stopped at Baltimore, and there was affirmative evidence, and an affirmative finding that there had been no such failure.

The remaining issues merit little discussion.

The district court was not in error in awarding maintenance and cure only through January 5, 1953, because after that date Macris failed to return to the hospital for further treatment as directed. Generally a refusal by a seaman of proffered care and treatment discharges the obligation of maintenance and cure. *Bailey* v. *City of New York*,

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[1] "The purpose of an amendment to conform to proof is to bring the pleadings in line with the actual issues upon which the case was tried; therefore an amendment after judgment is not permissible which brings in some entirely extrinsic issue or changes the theory on which the case was actually tried, even though there is evidence in the record—introduced as relevant to some other issue—which would support the amendment. * * *" 3 Moore's Federal Practice 846-47.

135 F. (2d) 427 (2 Cir., 1946); *The Saguache*, 112 F. (2d) 482 (2 Cir., 1940). Exceptions to this rule exist, when reasonable grounds for refusing care are shown. *Luth* v. *Palmer Shipping Corp.*, 210 F. (2d) 224 (3 Cir., 1954). But here the evidence was insufficient to remove the case from the operation of the general rule.

The contention that Macris was entitled to wages for the period after he left the EURYVIADES in California until the end of her voyage in Italy more than a year later is clearly without merit. His employment ended when he voluntarily signed off at Richmond, California, on July 7, 1952. He had no right to wages he would have earned had he continued aboard as second mate for another year. *Liciliano* v. *California Sea Products Co.*, 44 F. (2d) 784 (9 Cir., 1930); *Wahler* v. *Alaska SS Co.*, 91 F. Supp. 261 (W. D. Wash., 1950); *Raymond* v. *The Ella S. Thayer*, 40 Fed. 902 (N. D. Cal., 1887).

The judgment is affirmed.

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Supreme Court of the United States

OCTOBER TERM, 1957

No. 469

CONSTANTINE MACRIS,

Petitioner,

—against—

SOCIEDAD MARITIMA SAN NICOLAS, S. A., and PETMAR AGENCIES, INC.,

Respondents.

THE BRIEF OF RESPONDENTS, SOCIEDAD MARITIMA SAN NICOLAS, S. A. AND PETMAR AGENCIES, INC., IN OPPOSITION TO THE PETITION OF CONSTANTINE MACRIS FOR A WRIT OF CERTIORARI

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Opinions Below

The memorandum decision of the United States District Court for the Southern District of New York has not been officially reported; it appears in Appendix A of the Petition at pages 15-19. The opinion of the same court on Petitioner's motion for reargument of a denial of a motion to amend the pleadings is reported in 19 Federal Rules Decisions, page 397; it appears in Appendix A of the Petition at pages 9-14.

The opinion of the court below has not been officially reported; it appears in Appendix B of the Petition at pages 20-25.

Jurisdiction

It is not disputed that there is jurisdiction under Title 28, U. S. C. Section 1254 (1). It is presumed that Petitioner's reference (Petition, p. 2) to Section 1257 of Title 28, which refers to appeals from State Courts, is an inadvertent mistake.

Questions Presented

1. Whether a shipowner or a vessel (apart from the consideration of maintenance and cure) is liable to a seaman for personal injuries sustained in the course of his duties, without proof of any negligence, on the owner's part, or of unseaworthiness of the vessel.

2. Whether there is a denial of due process of law if the trial court, within the exercise of its discretion, denies a motion to amend.

Statement

Petitioner, a Greek citizen, sued a Panamanian owner of a vessel of Liberian registry (Petition, Appendix A, pp. 10, 18) and sought recovery for personal injuries under the Jones Act, 46 U. S. C. A. § 688, and the general maritime law (Petition, Appendix B, p. 20). Petitioner concedes (Petition, p. 3) that there is no issue of fact and that the facts are clearly and accurately set forth in Appendix A, including the footnotes. The trial court awarded Petitioner compensation only for maintenance and cure, but found no proof of negligence or unsea-

worthiness with regard to Petitioner's claim for indemnity for personal injury either within the scope of the pleadings, or with regard to the matters which Petitioner sought to include in the pleadings by amendment after adverse decision. The Court below affirmed the decision of the trial court in these particulars and also found that the trial court's denial of the motion to amend was clearly within its discretion and that, in any event, the denial was not prejudicial because there was no proof of negligence or unseaworthiness in any respect (Petition, Appendix B, pp. 23-24).

Argument

I. Petitioner's contention, that a vessel or her owner should be held liable to indemnify a seaman for personal injuries suffered in the course of duty on the vessel without the necessity of proving that such injuries were caused by negligence or unseaworthiness, is clearly unsound and contrary to the long established principles of applicable law. Petitioner's allusions (Petition, pp. 2-7) to improvident orders and proper orders are without merit. The trial court and the court below specifically found that there was no proof of negligence or of unseaworthiness.

The principles of the general maritime law set forth in *The Osceola* (1902), 189 U. S. 158, still obtain, that a seaman, apart from his right to maintenance and cure, is not entitled to indemnity for injuries caused by the negligence of the master or crew, but he is entitled to indemnity for injuries caused by unseaworthiness. *The Osceola*, supra, has

been consistently followed and cited with approval by this Honorable Court: *O'Donnell* v. *Great Lakes Dredge & Dock Co.* (1943), 318 U. S. 36, 40; *Aguilar* v. *Standard Oil Co. of New Jersey* (1943), 318 U. S. 724, 730; *Mahnich* v. *Southern Steamship Co.* (1944), 321 U. S. 96, 99; *Swanson* v. *Marra Bros, Inc.* (1946), 328 U. S. 1, 4; *Seas Shipping Co., Inc.* v. *Sieracki* (1946), 328 U. S. 85, 90; *Fink* v. *Shepard Steamship Co.* (1949), 337 U. S. 810, 815; *Pope & Talbott, Inc.* v. *Hawn* (1953), 346 U. S. 406, 413; *Boudoin* v. *Lykes Bros. S. S. Co.* (1955), 348 U. S. 336, 338-339.

Under the Jones Act, 41 Stat. 1007, 46 U. S. C. A. § 688, which is not applicable here (Petition, Appendix A, p. 18) negligence of the owner of the vessel, or her officers or crew, must be established by the seaman in order to recover. *De Zon* v. *American President Lines* (1943), 318 U. S. 660, 665, 672.

Keen v. *Overseas Tankship Corp.* (2 Cir., 1952), 194 F. 2d 515; cert. den. 343 U. S. 966 (cited in the Petition at pp. 3, 4) defined the warranty of seaworthiness as applicable to fellow seamen, however, proof of breach of that warranty is always essential to recovery; *Boudoin* v. *Lykes Bros. S. S. Co.*, supra.

Socony-Vacuum Oil Co., Inc. v. *Smith* (1938), 305 U. S. 424 (cited in Petition, p. 3), held, essentially, that the rule applicable to a seaman's claim for personal injuries suffered in the course of duty, is that of comparative negligence, and not the rule of contributory negligence or assumption of the risk.

Pope & Talbott, Inc. v. *Hawn*, supra (cited in Petition, p. 5), held, essentially, that a longshoreman's suit for personal injury against the shipowner is a maritime tort, and that the principle of comparative negligence must be applied.

None of the cases cited by Petitioner hold, or even suggest, that under the existing laws of the United States (apart from consideration of maintenance and cure) a seaman is entitled to recover indemnity from the vessel or her owners for personal injury without proof that such injury was caused by negligence or unseaworthiness. The trial court and the court below found there was no proof of negligence or unseaworthiness (Petition, pp. 9-25), and these findings are not disputed by the Petitioner. Petitioner's proposal that a seaman should recover indemnity for injury suffered, absent proof of negligence or unseaworthiness, is not supported by either the statutory law or the general maritime law of this country, and would require Congressional action. It ought not to be directed to this Court; *Lauritzen* v. *Larsen* (1953), 345 U. S. 571, 593; *DeZon* v. *American President Lines*, supra, 672.

II. Petitioner's contention that the trial court's refusal of the requested amendment was a denial of due process is equally untenable.

Petitioner's request to the trial court for an amendment, after an adverse decision, was made under Rule 15 of the Federal Rules of Civil Procedure, and it was within the discretion of the trial court to grant or refuse this request. The court below held that the trial court was clearly within its discretion in denying the motion to amend under the circumstances found in the record; it further found that the denial of the motion was not prejudicial in any event because Petitioner failed to prove a breach of duty either within the scope of the pleadings or within the scope of the requested amendment (Petition, Appendix B, at pp. 23-24). Under these circumstances, Petitioner clearly was not deprived of due process of law; *Steven's*

Administrator v. *Nichols* (1895), 157 U. S. 370; *Sawyer* v. *Piper* (1903), 189 U. S. 154; *Roller* v. *Murray* (1914), 234 U. S. 738

The trial court's denial of the motion to amend was a correct and proper exercise of its discretionary powers in the circumstances; *Sims* v. *Andrews* (10 Cir. 1941), 118 F. 2d 803, 807; *United States* v. *City of Brookhaven* (5 Cir. 1943), 134 F. 2d 442, 446; *Nordstrom* v. *McAllister Bros. Inc.* (S. D. N. Y.), 9 F. R. Service, 15b.1, Case 5; *Wheeler* v. *West India S. S. Co.* (2 Cir. 1953), 205 F. 2d 354, cert. den. 346 U. S. 889; 3 Moore's Federal Practice, 846-847.

Conclusion

The decision of the court below is correct. The petition fails to present any important reason for granting the writ. No substantial question is raised. There is no conflict of decision. Moreover, the record below is barren of evidence tending to support the questions attempted to be raised by the petition. It is respectfully submitted that this Court should deny the petition.

Respectfully submitted.

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No. 469

In the Supreme Court of the United States

OCTOBER TERM, 1957

CONSTANTINE MACRIS, PETITIONER

v.

SOCIEDAD MARITIMA SAN NICOLAS, S. A., AND PETMAR AGENCIES, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

J. LEE RANKIN,
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GEORGE COCHRAN DOUB,
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

Pursuant to the request of the Court, the United States respectfully submits the following expression of its views on the issues involved in this case.

STATEMENT

Petitioner, a Greek national, was hired as second mate of the S. S. Euryviades in November, 1951, in Greece (Pet. 21). Two months later, while the vessel was moored at Bremen, Germany, he sustained a hernia while engaged with other members of the crew in hauling in a line (Pet. 21). He was examined by a doctor in Bremen, and again in Santos, Brazil, the ship's next port of call (Pet. 10, 21). The ship then

proceeded via Trinidad to Baltimore, Maryland, where petitioner was again examined both by a private physician and at a United States Public Health Service Hospital (Pet. 21). He was found "fit for light work not involving heavy lifting," but an operation was recommended (Pet. 21). He signed off the vessel for return to Greece for the operation, but when faced with a few days detention at Ellis Island while awaiting passage home, he voluntarily signed back on as second mate of the Euryviades on April 7, 1952, and made the trip from Baltimore to Korea and back to California (Pet. 21).

When the vessel arrived in California in the summer of 1952, petitioner again signed off the ship for the purpose of having an operation (Pet. 21). He traveled to New York at his employer's expense, and underwent two operations at a hospital there in August 1952 (Pet. 22). Afterwards, petitioner suffered physical impairment, allegedly caused by the administration of an anaesthetic in the course of the second operation (Pet. 22). He remained in an out-patient status, but, although directed to do so, he failed to return for further treatment (Pet. 22).

Petitioner's complaint in the District Court was expressly limited to a claim for recovery for the aggravation of his injury caused by the alleged negligence of the respondents and the unseaworthiness of their vessel during the three-month period following his re-employment in Baltimore on April 7, 1952 (Pet. 22). He claimed that this aggravation made necessary two operations instead of one, and thereby

caused his subsequent disability (Pet. 22).[1] After a five-day trial, the District Court found that this cause of action had not been proved, and found as a fact that petitioner's condition had not deteriorated between his re-employment in Baltimore on April 7, 1952, and the time he left the ship in California on July 7, 1952 (Pet. 16–17, 22).

At the conclusion of the trial, petitioner's counsel made a "perfunctory" motion "to amend the pleadings to conform to the proof" (Pet. 23); after the District Court had announced its adverse decision on the merits, counsel renewed this motion and indicated for the first time that he desired to broaden his pleadings to assert the respondents' liability for the original hernia in Bremen and for its aggravation during the voyage from Bremen to Baltimore (Pet. 13, 23). The District Court denied this motion (Pet. 9–14), on the ground that proof had not been taken on this new claim except as incidental to other matters (Pet. 11). The trial judge pointed out that petitioner's counsel had deliberately chosen the theory upon which he in-

[1] The opinion of the District Court states (Pet. 10): "Petitioner limited his claim to aggravation of his condition after his re-employment in Baltimore. By so doing he believed that he strengthened his contention that this Court should assume jurisdiction of the subject matter and that the Jones Act was applicable. This position was maintained consistently throughout the trial. Plaintiff did offer proof of the prior events at Bremen and Santos, but this proof was received solely upon the issue of defendants' duty subsequent to re-employment in Baltimore — not as to possible fault of the defendants in Bremen or between Bremen and Baltimore. Defendants objected to its receipt for any purpose. Plaintiff acquiesced in the Court's limitation."

tended to proceed and that he had refrained from asking to amend until the case had been lost upon the original theory (Pet. 13).

The Court of Appeals affirmed, holding that in these circumstances the trial court was clearly within its discretion in denying the motion to amend (Pet. 24). The court found further that the denial of the motion to amend was not prejudicial in any event "for the simple reason that the evidence failed to show any breach of duty to Macris on the part of the defendants prior to the ship's arrival in Baltimore" (Pet. 24).[2] Petitioner now seeks review in this Court of the denial of his motion to amend, and contends that he is entitled to further compensation for his injury despite the absence of either negligence or unseaworthiness.

DISCUSSION

Even if the very considerable procedural bars to the amendment of petitioner's complaint were swept aside, we can see no substantive basis in the present

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[2] The Court of Appeals stated (Pet. 24):

> * * * There was no proof that unseaworthiness of the vessel or the defendants' negligence was a cause of Macris' original injury at Bremen. There was no proof that aggravation of his condition between Bremen and Baltimore, was so caused. There was no proof of any negligent failure to provide Macris with medical treatment either before or after the vessel stopped at Baltimore, and there was affirmative evidence, and an affirmative finding that there had been no such failure.

[3] Both of the courts below held that there was no ground for permitting petitioner, after trial, to change the theory of his action and seek recovery for his original injury, rather than its alleged aggravation after his re-employment in Baltimore. In denying petitioner's motion under Rule 15 (b),

law—including the law as it can be appropriately developed by admiralty courts—on which he could recover damages for his injury. Both the District Court and the Court of Appeals found that the evidence failed to show any breach of duty to petitioner on the part of the respondents prior to the ship's arrival in Baltimore, whether predicated upon negligence or upon unseaworthiness, and whether referring to the causation of his injury, its aggravation, or the medical treatment afforded it. (Pet. 16, 24.) Nor does petitioner contend that he could produce any evidence to this effect. He urges rather that, notwithstanding absence of proof of negligence or unseaworthiness, he is nevertheless entitled to compensation because he was injured in the performance of his duties, while acting in obedience to an order of his superior. We

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F. R. Civ. P., to amend his pleadings to conform to the evidence, the District Court pointed out that "proof had not been taken as to the claim attempted to be added to the complaint, except as incidental to other matters" (Pet. 11), and accordingly that an amendment in these circumstances was improper. See 3 Moore's *Federal Practice* (2nd ed.), 846-847; *Simms* v. *Andrews*, 118 F. 2d 803, 807 (C. A. 10); *United States* v. *City of Brookhaven*, 134 F. 2d 442, 446 (C. A. 5). The court likewise refused to permit amendment under Rule 15 (a), holding that petitioner's "failure to move to amend in advance of trial was deliberate and not excusable" (Pet. 13), and that petitioner's counsel "had in fact badgered his 'opponent" with the possibility of this amendment, as an "incident in a war of nerves." (Pet. 13.) The Court of Appeals affirmed the District Court's ruling, concluding (Pet. 24) that "[u]nder the circumstances disclosed by the record, the trial court was clearly within its discretion in denying the motion to amend." For these reasons, irrespective of the merits of petitioner's present claim in this Court, he would appear to be barred from pressing it at this late stage in the litigation.

believe, however, that under existing law petitioner has received all of the benefits to which he is entitled for an injury incurred in such circumstances and accordingly that even if he were permitted to amend his complaint he could show no substantive ground for recovery.

1. Petitioner states no claim under existing law. A seaman's right to recover for injuries received in the course of his employment is limited, on the one hand, to a contractual right under the general maritime law to maintenance and cure, plus indemnity for his injuries if they result from the vessel's unseaworthiness and, on the other hand, a right under the Jones Act, 46 U. S. C. 688, to recover damages for injury or death caused by the negligence of the owner, master, or fellow-servant. Petitioner does not in this Court allege violation of either of these rights.

(*a*) *The general maritime law.* Under the general maritime law of the United States, a seaman who is injured in the course of his employment is entitled both to maintenance and cure, and to an indemnity from the vessel and its owners beyond maintenance and cure for injuries sustained as a result of the failure of the owners of the ship to provide a seaworthy vessel, or to supply and keep in order the proper appliances appurtenant to the ship. *The Osceola*, 189 U. S. 158. Petitioner makes no claim that the ship on which he received his injuries was unseaworthy; nor does he contend here that he was denied any of the maintenance and cure to which he was entitled. As the result of his injuries, he was awarded maintenance and cure through January 5, 1953, the District

Court holding that the shipowner's obligation was discharged after that date because petitioner refused to return to the hospital for further treatment as directed (Pet. 14).[4] In addition, the trial court expressly left open the possible right of petitioner to claim maintenance and cure for any future corrective operation and recuperation therefrom. Petitioner has thus received the full measure of maintenance and cure to which he was entitled, and, since he makes no claim that the vessel was unseaworthy, he has shown no basis for any further relief under the general maritime law.

(*b*) *The Jones Act.* In addition to the seaman's contractual rights under the general maritime law to maintenance and cure and indemnity, he is also entitled under the Jones Act, 46 U. S. C. 688, to recover damages for injuries or death in consequence of the negligence of the owner, the master, or a fellow member of the crew, by means of an action at law against the owner. The gist of an action under the Jones Act is negligence (*De Zon* v. *American President Lines,* 318 U. S. 660, 665; *Engel* v. *Davenport,* 271 U. S. 33), which the seaman must establish in

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[4] In affirming the District Court on this point, the Court of Appeals stated (Pet. 24-25):

> • • • Generally a refusal by a seaman of proffered care and treatment discharges the obligation of maintenance and cure. *Bailey* v. *City of New York,* 135 F. (2d) 427 (2 Cir., 1946); *The Saguache,* 112 F. (2d) 482 (2 Cir., 1940). Exceptions to this rule exist, when reasonable grounds for refusing care are shown. *Luth* v. *Palmer Shipping Corp.,* 210 F. (2d) 224 (3 Cir., 1954). But here the evidence was insufficient to remove the case from the operation of the general rule.

order to recover. But just as petitioner makes no allegation of unseaworthiness, so too he makes no claim that his injury was caused by negligence, either of a ship's officer or of a fellow crew member. Accordingly, there is no basis for relief under this statute.[5]

2. Petitioner, then, has alleged no violation of an existing right, either contractual or statutory, and accordingly there is no present remedy of which he can avail himself. He nevertheless contends that this Court should find some basis for awarding him compensation solely because his injury was received in the course of his employment. In view of the settled principles of maritime law respecting the rights of injured seamen, however, and the consistent refusal by Congress to modify these rights to provide for compensation on such a basis, we are unable to see any ground for affording petitioner judicial relief.

(*a*) The circumstances of petitioner's injury would support a claim for compensation only if petitioner were entitled to the benefits of a workmen's compensation statute. "[T]he basic operating principle [of workmen's compensation legislation] is that an employee is automatically entitled to certain benefits

[5] Moreover, there is considerable question whether the Jones Act would apply to this case. The petition is an alien, and the District Court found sufficient evidence of foreign ownership to treat the shipowner "as a Panamanian owner in fact as well as in form * * *" (Pet. 18). Petitioner's injury occurred in a foreign port (Bremen), and it seems unlikely that he could claim the benefits of the Jones Act in a suit in a United States court. Cf. *Lauritzen* v. *Larsen*, 345 U. S. 571; *The Paula*, 91 F. 2d 1001, 1003–1004 (C. A. 2); *Gambera* v. *Bergoty*, 132 F. 2d 414, 415 (C. A. 2), certiorari denied, 319 U. S. 742.

whenever he suffers a 'personal injury by accident arising out of and in the course of employment'; * * * negligence and fault are largely immaterial * * *." In exchange for the "modest but assured benefits" of workmen's compensation, employees and their dependents "give up their common-law right to sue the employer for damages for any injury covered by the act," 1 Larson, *Workmen's Compensation Law*, § 1.10.

Although Congress provided compensation coverage for some maritime workers by the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. 901, *et seq.*, that statute expressly excludes from its "coverage" a "master or members of a crew of any vessel * * *." 33 U. S. C. 903. This exclusion "was at the request of seamen who notified the [Congressional] committee in charge that they preferred the remedy for damages under the Act of 1920 [the Jones Act] to the benefits that would be theirs under a system of workmen's compensation." *Warner* v. *Goltra*, 293 U. S. 155, 160; see Hearings before a Subcommittee of the Senate Committee on the Judiciary, 69th Cong., 1st Sess., on S. 3170, at p. 17; 68 Cong. Rec. 5908; *Nogueira* v. *N. Y., N. H. & H. R. Co.*, 281 U. S. 128, 134, 136.[4] All subsequent efforts to extend workmen's compensation coverage to masters and crew

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[4] Nor are seamen such as petitioner entitled to the benefits of state workmen's compensation acts; the Jones Act "covers the entire field of liability for injuries to seamen" and is "paramount and exclusive and supersedes the operation of all state statutes dealing with that subject." *Lindgren* v. *United States*, 281 U. S. 38, 47. See *Nogueira* v. *N. Y., N. H. & H. R. Co.*, *supra*, 281 U. S. at 135; 2 Larson, *Workmen's Compensation Law*, § 90.42.

members have likewise been met with the opposition of the representatives of various seamen's organizations. See *South Chicago Co.* v. *Bassett,* 309 U. S. 251, 256–257; *Norton* v. *Warner Co.,* 321 U. S. 565, 570; *Hust* v. *Moore-McCormack Lines,* 328 U. S. 707, 715; *Farrell* v. *United States,* 336 U. S. 511, 518; Statement of National Maritime Union, Hearings before the House Committee on the Merchant Marine and Fisheries on H. R. 7424, 77th Cong., 2d Sess., pp. 30–31; Hearings before the House Committee on Merchant Marine and Fisheries, 76th Cong., 1st Sess. on H. R. 6726 and H. R. 6881; Hearings before a Subcommittee of the Senate Committee on Commerce, 76th Cong., 3rd Sess., on H. R. 6881, p. 111, referring to opposition of seamen and their representatives to such legislation in 1922, 1927, 1939 and 1940.[7]

Thus, despite the fact that all the other leading maritime nations of the world have applied the prin-

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[7] The reason for this opposition was summarized in a brief by Max Lustig, Assistant General Counsel for the National Maritime Union, in these words (Hearings before the House Committee on Merchant Marine and Fisheries, 76th Cong., 1st Sess., on H. R. 6726 and H. R. 6881, p. 83):

> The answer is to be found in the United States statute books and general maritime laws affecting seamen who are injured. Upon an analysis we find that the existing maritime laws amply afford all of the protection that a seaman needs when his injuries are minor and not of a totally disabling kind. That protection is guaranteed by the provisions generally known as maintenance and cure. But, in addition to maintenance and cure, the law guarantees to seamen the right to maintain an action against the steamship owner, to recover by trial, before a court and jury, damages for partial or total disability.

ciple of workmen's compensation to seamen,[8] and despite the earnest recommendation of impartial observers that this country do likewise,[9] seamen have consistently rejected the more certain, if more modest, benefits of a compensation statute for a possibly greater recovery under the Jones Act. "Wisely or unwisely, they have steadfastly preferred the traditional remedy of jury trial for negligence to workmen's compensation based on liability without fault." *Hust* v. *Moore-McCormack Lines,* 328 U. S. 707, 715. Whatever may be said as to the wisdom of this choice, the fact remains that it has been the basis of a consistent Congressional policy since the passage of the Jones Act in 1920 to leave undisturbed the existing scheme of remedies available to masters and crew members. Faced with proposals to change the law, Congress has determined to leave it as it is. And, of course, the general authority of Congress to determine the remedies to be afforded seamen injured while engaged in maritime service is beyond dispute. *O'Donnell* v. *Great Lakes Co.,* 318 U. S. 36, 42; *Crowell* v. *Benson,* 285 U. S. 22, 39; *Southern Pacific Co.* v. *Jensen,* 244 U. S. 205, 215.

(*b*) As we have just indicated, during the many hearings which have been held before Congressional committees considering the enactment of comprehen-

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[8] The nations which have done so include Denmark, France, Germany, Great Britain, Holland, Italy, Norway, and Sweden. See Hearings before a Subcommittee of the Senate Committee on Commerce, 76th Cong., 3d Sess., on H. R. 6881, p. 17.

[9] See *e. g.*, Hearings before a Subcommittee of the Senate Committee on Commerce, 76th Cong., 3d Sess., on H. R. 6881, pp. 79–80, 154–156, 162–163, 181–187, 187–188, 292–296.

sive statutory coverage for the entire maritime industry, the relative merits of existing remedies as compared with proposed systems have been explored exhaustively. The failure of Congress to make any change in the established rules regarding the rights of injured seamen clearly constitutes implied approval of the rules as they now exist. For this reason, this Court in *Farrell* v. *United States*, 336 U. S. 511, was constrained to reject a comparable plea by an injured seaman for judicial extension of the traditional remedies available to him. Noting that organized seamen had consistently opposed a system of workmen's compensation (336 U. S. at 518), the Court concluded (336 U. S. at 519):

> The need of this seaman for permanent help is great and his plight most unfortunate. But as the evidence has afforded no basis for supplying that need by finding negligence, neither does the case afford a basis for distortion of the doctrine of maintenance and cure. This seaman was in the service of the United States and extraordinary measures of relief while not impossible are not properly addressed to the courts.

The reasoning of the *Farrell* case is fully applicable here. The courts cannot appropriately develop the new remedies petitioner seeks. And under the existing scheme of seamen's remedies, which Congress has repeatedly re-examined and consistently refused to modify, a seaman in petitioner's position, injured in the course of his employment, must allege and prove either negligence or unseaworthiness in order to recover compensation for his injuries beyond his right

to maintenance and cure. Petitioner has not made, and plainly could not support, such allegations. Accordingly, he was entitled only to maintenance and cure as stated in the proceedings below, and he has no claim under existing law for any further compensation for his injury.

CONCLUSION

For these reasons, we suggest that this Court may find it appropriate to deny the petition for a writ of certiorari.

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